FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

FILED JULY 4, 1953

Probable jurisdiction noted October 12, 1953

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[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 4036

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at Richmond on the 13th day of August, 1952.

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee

From the State Corporation Commission

APPEAL AS OF RIGHT AWARDED—August 13, 1952

This is to certify that upon the petition of Railway Express Agency, Incorporated, (No. 10,629), an appeal as of right has been awarded by one of the Justices of the Supreme Court of Appeals on the 12th day of August, 1952, from an order entered by the State Corporation Commission on the 16th day of June, 1952, *in re* application of Railway Express Agency, Incorporated, no bond being required.

[fol. 2] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4037

[Title omitted]

APPEAL OF RIGHT AWARDED—August 13, 1952

This is to certify that upon the petition of Railway Express Agency, Incorporated, (No. 10,767), an appeal as of right has been awarded by one of the Justices of the Supreme Court of Appeals on the 12th day of August, 1952, from an order entered by the State Corporation Commission on the 16th day of June, 1952, *in re* application of Railway Express Agency, Incorporated, no bond being required.

[fol. 3] BEFORE THE STATE CORPORATION COMMISSION

PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED, (FOR CORRECTION OF ASSESSMENT OF A LICENSE TAX FOR THE YEAR 1950, AND FOR A REFUND OF SUCH LICENSE TAX)

(Case No. 10629)

To the Honorable, the State Corporation Commission of Virginia:

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 230 Park Avenue, New York, New York, respectfully presents this Petition pursuant to the provisions of Section 58-1122 of the Code of Virginia, 1950, and represents to your Honorable Body as follows:

1. That it is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks and airplanes in each of the States of the United States, including the State of Virginia, in which it sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia, to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been [fol. 4] assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by Sec-

tion 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company paid a license tax in the year 1950 in the amount of $16,109.92, based upon its gross receipts from operations in this State in the year 1949 in the amount of $749,298.77.

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in interstate commerce in this State, and has likewise reported, under protest, been assessed with in the manner hereinafter stated, and has paid annually, under protest, a license tax (for the privilege of doing business in this State) allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by Section 58-547 and its antecedent sections of the Tax Code of Virginia.

5. That the legality, manner of determining and amount of the license tax assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of the Code of Virginia, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid section of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections of the Code of Virginia, your Petitioner has consistently denied liability therefore, and has paid all such taxes so imposed upon it under protest. In general, the form of protest accompanying each annual report by Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" has been as follows:

"This company does an interstate business through, into and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

[fol. 5] "The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 219 of the Tax Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $—— reported as 'All Receipts earned in Virginia on business passing through, into or out of this State' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

and upon all remittances made by Petitioner of amounts paid by it on account of license taxes so imposed against it, it has designated the same as "Paid Under Protest" and receipts issued to it by the Treasurer of the State of Virginia have uniformly recited and recognized that such license fees were "Paid Under Protest".

That gross receipts in the amount of $3,286,775.70 were determined by your Honorable Body to have been derived by Petitioner in the year 1949 from the conduct of its express business in interstate commerce on 3,652.87 miles of railroad and steamship companies of which your Petitioner operated in this State, upon which a tax, at the rate of $899.78 in the aggregate amount of $70,665.68, was imposed in the year 1950.

6. That the business of your Petitioner in the carrying of goods, wares and merchandise in express service over lines of railroad and steamship companies operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the license tax

annually sought to be imposed therein by Section 58-547 and its antecedent sections of the Code of Virginia is therefore unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to [fol. 6] do an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States.

Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a license tax for the year 1950, in the amount of $70,665.68, may be reviewed and corrected, and held to be invalid, null and void, that the said 1950 assessment may be expunged and removed from the public records, and that the Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the provisions of Section 58-1124 of the Code of Virginia, in the amount of $70,665.68, with interest thereon from the date of payment, in refund of the tax so paid by Petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated, by W. A. Benson, Vice President.

Thomas B. Gay, Attorney.

Duly sworn to by W. A. Benson. Jurat omitted in printing.

[fol. 7] BEFORE THE STATE CORPORATION COMMISSION

PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED, (FOR CORRECTION OF ASSESSMENT OF A LICENSE TAX FOR THE YEAR 1951, AND FOR A REFUND OF SUCH LICENSE TAX)

Case No. 10767

To the Honorable, the State Corporation Commission of Virginia:

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 230 Park Avenue, New York, New York, respectfully presents this Petition pursuant to the provisions of the statutes of the State of Virginia in such cases made and provided, and represents to your Honorable Body as follows:

1. That it is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks, and airplanes in each of the States of the United States, including the State of Virginia, in which it is sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your Petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

[fol. 8] 3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by Sec-

tion 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company paid a license tax in the year 1951 in the amount of $13,377.56, based upon its gross receipts from operations in this State in the year 1950 in the amount of $622,211.90.

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in interstate commerce in this State, and has likewise reported, under protest, been assessed with, in the manner hereinafter stated, and has paid annually, under protest, a license tax (for the privilege of doing business in this State) allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by Section 58-547 and its antecedent sections of the Tax Code of Virginia.

5. That the legality, manner of determining and amount of license tax assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of its Code of Virginia, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid section of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections of the Code of Virginia, your Petitioner has consistently denied liability therefor, and has paid all such taxes so imposed upon it under protest. In general, the form of protest accompanying each annual report by Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" has been as follows:

[fol. 9] "This company does an interstate business through, into and out of Virginia but it has no way of ascer-

taining how much of the receipts on that business is earned in Virginia.

"The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 219 of the Tax Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $..... reported as 'All Receipts earned in Virginia on business passing through, into or out of this state', is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to interstate receipts of protestants, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

and upon all remittances made by Petitioner of amounts paid by it on account of license taxes so imposed against it, it has designated the same as "Paid Under Protest" and receipts issued to it by the Treasurer of the State of Virginia have uniformly recited and recognized that such license fees were "Paid Under Protest".

That gross receipts in the amount of $3,090,916.55 were determined by your Honorable Body to have been derived by Petitioner in the year 1950 from the conduct of its express business in interstate commerce in the State of Virginia, upon which a State license tax at the rate of $2.15 per $100.00, in the aggregate amount of $66,454.71, was assessed and imposed in the year 1951.

6. That the assessment of the aforesaid license tax in the amount of $66,454.71 on the gross receipts derived by your Petitioner in the year 1950 from the conduct of its express business in interstate commerce was not made in accordance with the terms and provisions of Section 58-547 of the Code

of Virginia, 1950 (which provide for an apportionment of total receipts by applying a fraction the numerator of which is the entire mileage over which such business is done and the denominator of which is Virginia mileage, which should, if otherwise valid, have applied a fraction, the numerator of [fol. 10] which is Virginia mileage and the denominator of which is the entire mileage over which such business is done) and is therefore null and void.

7. That the business of your Petitioner in the carrying of goods, wares and merchandise in express service over the lines of railroad and steamship companies operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the license tax annually sought to be imposed thereon by Section 58-547 and its antecedent sections of the Code of Virginia is therefore unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your Petitioner to do an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States.

Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a License tax for the year 1951, in the amount of $66,454.71, may be reviewed and corrected, and held to be invalid, null and void, and that the said 1951 assessment may be expunged and removed from the public records, and that the Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the statutes of the State of Virginia in such cases made and provided, in the amount of $66,454.71, with interest thereon from the date of payment, in refund of the tax so paid by petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated, by W. A. Benson, Vice President.

Thomas B. Gay, Attorney.

Duly sworn to by W. A. Benson. Jurat omitted in printing.

[fol. 11] BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

Case No. 10629

ORDER SETTING CAUSE FOR ARGUMENT—July 19, 1951

On July 16, 1951, came the Railway Express Agency, Incorporated, by Thomas B. Gay, its attorney, and presented a petition under Section 58-1122 of the Code for the correction of assessment and refund of taxes on gross receipts in the amount of $70,665.68 collected from the said Railway Express Agency, Incorporated and representing a tax on its gross receipts for the year 1949 and imposed in the year 1950. Accordingly, it is

Ordered:

(1) That a proceeding under Section 58-1123 of the Code be instituted, assigned Case No. 10629, docketed and set for hearing at 10:00 o'clock, a. m., on July 30, 1951, in the courtroom of the Commission in the State Office Building in the City of Richmond, Virginia.

[fol. 12] (2) That an attested copy of this order be sent to the Attorney General of Virginia and that attested copies of this order be sent to the attorney for the petitioner and to the Director of the Division of Public Utility Taxes.

N. W. Atkinson, Clerk of the State Corporation Commission.

BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

Case No. 10767

ORDER SETTING CAUSE FOR ARGUMENT—November 8, 1951

On November 7, 1951, came the Railway Express Agency, Incorporated, by Thomas B. Gay, its attorney, and presented

a petition for the correction of assessment and refund of taxes in the amount of $66,454.71, collected from the said Railway Express Agency, Incorporated, and representing a tax on its gross receipts for the year 1950 and imposed in the year 1951. Accordingly, it is

Ordered:

(1) That a proceeding be instituted, assigned Case No. 10767, docketed and set for hearing at 10:00 o'clock a. m., on January 22, 1952, in the courtroom of the State Corporation Commission in the State Office Building in the City of Richmond, Virginia.

(2) That an attested copy of this order be sent to the Attorney General of Virginia and that attested copies of this order be sent to the attorney for the petitioner and to the Director of the Division of Public Utility Taxes.

N. W. Atkinson, Clerk of the State Corporation Commission.

[fol. 13] BEFORE THE STATE CORPORATION COMMISSION

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[Title omitted]

Cases Nos. 10,629 and 10,767

Present: Commissioners H. Lester Hooker (Chairman), W. Marshall King, Ralph T. Catterall (Presiding).

APPEARANCES:

Thomas B. Gay, H. M. Pasco, W. H. Waldrop, Jr., Counsel for Applicant; Henry T. Wickham, Assistant Attorney General, Counsel for the Commonwealth; Norman S. Elliott, Counsel for the Commission.

PAUL GROSS, JR., a witness introduced on behalf of Petitioner, being first duly sworn, testified as follows:

"By Mr. Gay:

Q. Will you please state your name and occupation?

A. My name is Paul Gross, Jr., and my position is that of Assistant to Vice President, Accounting of the Railway Express Agency, Incorporated, of Virginia, and Railway Express Agency, Incorporated, the Delaware corporation."

* * * * * * *

"Q. Did Exhibit 3 in Case 10629 and Exhibit 3 in Case 10767 contain a form of protest in respect to the Company's non-liability for license taxation in Virginia on account of the fact that its gross earnings from interstate commerce were not taxable in this State?

"A. They do contain such protest."

* * * * * * *

"Q. Mr. Gross, have you, at my request, prepared a statement showing the gross receipts reported and the State license tax paid as assessed by the Commission for the years 1931 through 1951 by the Delaware Company?

"A. I have.

[fol. 14] "Q. Does that statement also contain a showing of money on deposit and taxes paid on that?

"A. It does.

"Q. And does it also show the reported value of real and tangible property of the corporation?

"A. Yes.

"Q. And the amount of assessment of the property valued by the Commission?

"A. It does.

"Q. And the tax paid to the localities?

"A. Yes.

"Q. All for the years 1931 through 1951, inclusive?

"A. Yes."

Mr. Gay: We offer that as the next exhibit in both cases.

Commissioner Catterall: It will be received as Exhibit 6 and will be filed in Case 10767, it being understood that only one record will be written up for both cases.

* * * * * * *

"Q. Have you also prepared, at my request, a statement showing the same information with respect to the Virginia Company for the same period of time?

"A. With the exception that this statement shows the payment of assessments for the years 1933 to 1951, inclusive."

Commissioner Catterall: That will be Exhibit 7 in Case 10767.

Mr. Gay:

Q. Coming back to the statement, Exhibit 6, Mr. Gross, I notice beginning with the year 1940 and running through the year 1942, that there are two figures shown for each year, which are explained by notation at the bottom bearing similar symbols, the first in each year being amount of gross receipts reported and the other amount of gross receipts assessed by the Commission; is that correct?

A. That is correct.

Mr. Gay: I would like to offer, if your Honors please, at this point, a copy of a letter from Mr. H. S. Marx, then General Counsel of the Railway Express Agency, Incorporated, of December 10th, 1942, to Mr. J. C. Masten, First Assistant [fol. 15] Assessor, with the attached memorandum, the original of which I take to be in Mr. Masten's files.

* * * * * * *

"Commissioner Catterall: Then it will be admitted in evidence as Exhibit 8."

* * * * * * *

"Mr Gay:

Q. Are you familiar with the memorandum attached to Mr. Marx's letter to Mr. Masten, attached to the letter just filed?

A. I am.

Q. Subsequent to the date of that letter, has the Company reported gross receipts to the Commission in conformity with the understanding expressed therein, and has it reported such gross receipts in accordance with that understanding, however, under protest?

A. Yes.

Q. I call attention to the language of Section 58-547 of the Tax Code of Virginia, to the effect that where an express company is 'operating partly within and partly without

this State' the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State', and ask you whether the amounts of gross receipts as reported by the Company have any relationship to the statutory formula?

A. They do not.

Q. Do you know what sort of formula was employed for the purpose of determining the amount of interstate gross receipts of the Delaware Company prior to 1942?

A. The gross receipts were determined by applying to the mileage operated in the State an arbitrary or fixed amount to represent the gross receipts per mile.

Q. You mean the mileage operated in Virginia with respect to the System mileage?

A. No, the miles operated in the State of Virginia by the Express Company, to which was applied an arbitrary or fixed amount of revenue in the sum of say $300 or $350 per mile.

Commissioner Catterall:

Q. Mr. Gay did not read you the part of the statute that [fol. 16] was in the formula, and when you said the formula was not followed, did you mean the formula was not followed or what Mr. Gay read you was not followed?

A. What we did follow was the understanding reached and referred to in the letter submitted as Exhibit No. 8. That is the formula we followed. I understood Mr. Gay's question to be whether that formula represented or effectively showed or reflected the gross receipts in Virginia contemplated under the particular section of the statute from which he has read.

Mr. Gay:

Q. As I understand you, then, the gross receipts upon which the Company was taxed in the years prior to 1942 were determined by the use of some such figure as $300 or $325 per mile of miles operated in Virginia?

A. That is correct.

Q. Turn, sir, a moment to Exhibit 7 and state what the gross receipts reported in Column D of that statement reflect?

A. The figure reported in column D of Exhibit 7 reflect the gross receipts reported by the Virginia Company and represent the gross intrastate receipts earned by the Virginia Company during the years indicated on Exhibit 7.

Q. Those are the actual gross receipts?

A. Yes.

Q. From intrastate commerce?

A. That is correct.

* * * * * * *

Cross-examination.

By Mr. Wickham:

"Q. You have testified to the fact that the Delaware Company has always filed under protest, or paid under protest rather, their so-called 'license taxes' based on gross receipts. Do you know whether or not the Delaware Company has, previous to these cases, filed any petitions for refunds for such taxes?

"A. I do not know of it.

"Q. Do you have any knowledge of any such petitions having been filed?

"A. No, I do not.

"Q. In your position as Assistant to the Vice President, if any petitions were filed, would you not be aware of them? [fol. 17] "A. If petitions were filed and the Accounting Department had been directly interested in the proceeding, we would be notified of it, yes.

"Q. You were aware that the petitions filed in this case were contemplated?

"A. As a matter of fact, I was not."

Commissioner Catterall:

Q. If any petitions in the past had been granted, would they have come to your attention?

A. They would.

Q. Has any information upon that come to your attention?

A. They did not come to my personal attention.

Mr. Wickham:

Q. Referring to the exhibit, the letter of the Delaware Company, and also the formula prescribed and set up in order to arrive at the proper tax on gross receipts, the Delaware Company agreed to this formula, did they not?

A. I would not term the memorandum 'an agreement.' I think it is an understanding reached between Mr. Marx, the writer of the letter, and Mr. Masten, outlining what the Delaware Company would report as to gross receipts for the year in question.

Q. The Delaware Company made no objection or protest to this formula on this point?

A. Except that the reports were filed in protest.

Q. But there was no objection to this formula as to the actual taxes to be paid?

A. I do not know of any except that they were filed with the protest attached and the drafts issued with protest attached, and the receipts were acknowledged 'paid' as having been received under protest."

* * * * * * *

"Q. Does the Delaware Company have any agreement with the railroads as to operating lines?

"A. The Railway Express Company, the Delaware Company, conducts the express transportation business over the lines of all railroads in the Country and the principal lines under the so-called 'Standard Agreement' or the 'Express Operations Agreement', which became effective in March, 1939.

[fol. 18] "Q. That 'Standard Agreement' is between the railroads and the Delaware Company?

"A. Yes."

* * * * * * *

Cross-examination.

By Mr. Elliott:

Q. The Delaware Company is owned by the railroads, as I understand it?

A. It is, the principal railroads. There are 68 stockholders.

Q. And any money which the Delaware Company earns over and above its expenses is paid to the railroads in the form of compensation for performing their part of the service?

A. That is correct. In the Accounting Classification, the account to which we charge off payments is designated 'Express Privileges' and has been in the accounts of the Interstate Commerce Commission many years.

Q. What securities does the Delaware Company have outstanding, or did it have in 1951?

A. In 1951, it had the one thousand shares of stock issued to the stockholders of the Railway Express Company. That is all.

Q. Does it have any other forms of debts or securities?

A. It does not.

Q. How does it raise its capital to do business?

A. The capital to do business was raised in 1929, or thereabouts, through the issuance of bonds in the sum of $32,000,000.

Q. Those bonds have be-n retired and there are no securities outstanding other than the capital stock you referred to; is that not correct?

A. That is correct.

• • • • • • •

Redirect examination.

"By Mr. Gay:

Q. You referred to the fact that the Delaware Company had a thousand shares of stock issued and outstanding and that it was issued to the railroads that own the property. [fol. 19] Was that stock issue had and the $32,000,000 of bonds issued listed issued in Finance Docket No. 7322?

A. They were approved by the Commission in that docket.

Q. Without going into the details, does the opinion in that case, Mr. Gross, recite historically the ownership and operation of the Express Company in America?

A. Very completely.

Mr. Gay: We don't want to file the opinion but we rely on the findings of the Commission in Finance Docket 7322,

reported in 150 I. C. C. at page 423, decision rendered February 11, 1929.

Commissioner Catterall: You will give us all of those references.

Mr. Gay: Yes, we will.

Mr. Gay:

Q. You stated those bonds had all been paid off, that is the $32,000,000, under the Interstate Commerce Commission order?

A. That is correct.

Q. Who paid them off?

A. The bonds were liquidated by contributions of cash made by the railroad companies to retire the bonds as and when they came due.

Q. So they were not paid out of the earnings of the Delaware Company?

A. Oh, no.

Q. How is this advance made by the railroads, to go a little further into that, although it may not be material, carried on the books of the Delaware Company, that is the advance made to pay off the bonds?

A. As indicated by the Balance Sheet of the Delaware Company, included in the annual information returns filed with the Interstate Commerce Commission and filed also with this Commission as of December 31st, 1950, the amount of the advances made by the stockholders to liquidate the bonds appear in Account 530, designated as 'Funded Debt Unsecured', in the sum of $28,608,570.

Q. The substance of that matter is that, instead of the public holding this $32,000,000 issue, as authorized by the Interstate Commerce Commission, at the date or when this was prescribed, that was paid off to the public and is now owed to the railroads?

A. That is correct."

[fol. 20] BEFORE THE STATE CORPORATION COMMISSION

STIPULATION OF COUNSEL AS TO RECORD ON APPEAL

It is stipulated by counsel for all parties:

1. Cases Nos. 10,629 and 10,767 having been heard together, only one record on appeal shall be made up and certified for both cases.

2. In Case No. 10,629 the tax was asses-ed pursuant to Section 58-547 of the Code in the amount of $70,665.68, the certified copy of the assessment therefor was received by the Petitioner on August 17, 1950, and the tax in the amount assessed was paid by the Petitioner to the Treasurer of Virginia on September 15, 1950, under the following protest:

"Railway Express Agency, Incorporated (a Delaware Corporation)

"This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

"The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $3,286,775.70 reported as 'All Receipts earned in Virginia on business passing through, into or out of this State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestants cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

3. In Case No. 10,767 the tax was assessed pursuant to Section 58-547 of the Code in the amount of $66,454.71, the certified copy of the assessment therefor was received by the Petitioner on August 18, 1951, and the tax in the amount [fol. 21] assessed was paid by the Petitioner to the Treasurer of Virginia on September 25, 1951, under the same protest under which the tax assessed for 1950 was paid.

4. Since the Commonwealth admits and the Commission has found that the taxpayer does no intrastate business in Virginia, the testimony and exhibits relating to that issue are not material on this appeal.

5. The record on appeal shall consist only of the petitions in both cases, the foregoing testimony of Paul Gross, Jr., Exhibits 6, 7, 8 in Case No. 10,767, the orders entered by the Commission, the opinion of the Commission, and this stipulation.

H. Merrill Pasco, Counsel for Applicant; Henry T. Wickham, Assistant Attorney General of Virginia; Norman S. Elliott, Counsel for the Commission.

BEFORE THE STATE CORPORATION COMMISSION

Case No. 10629

[Title omitted]

ORDER DISMISSING APPLICATION—June 16, 1952

On March 19, 1952, came again the applicant, Railway Express Agency, Incorporated, by Thomas B. Gay, H. Merrill Pasco and W. H. Waldrop, Jr., its attorneys, and came also the Commonwealth, by Henry T. Wickham, Assistant Attorney General, and the State Corporation Commission, by Norman S. Elliott, its Counsel; and the Commission having heard all of the evidence, continued this case to permit counsel for the applicant and the Commonwealth to submit briefs.

Now on this day, briefs having been filed by the parties, and the Commission, having considered the evidence and briefs submitted by counsel, is of the opinion and finds,

[fol. 22] for reasons stated in an opinion filed this day in this case and Case No. 10767, by Catterall, Commissioner, and concurred in by Hooker, Chairman, and King, Commissioner, that the petition herein was filed too late under Section 58-672 of the Code of Virginia of 1950, and the Commission has no jurisdiction to grant the relief requested.

It is, therefore, ordered:

(1) That the application of Railway Express Agency, Incorporated, for correction of assessment and refund of taxes for the year 1950, as set forth in its application, filed herein, be dismissed, because the Commission is without jurisdiction to pass upon said application and grant the relief requested, and that this proceeding be dropped from the docket; and

(2) That attested copies hereof, together with copies of the Commission's opinion referred to herein, be sent to counsel for the applicant, and to the Attorney General of the Commonwealth.

A True Copy. Teste:
N. W. Atkinson, Clerk of the State Corporation Commission.

BEFORE THE STATE CORPORATION COMMISSION

Case No. 10767

[Title omitted]

ORDER DISMISSING APPLICATION—June 16, 1952

On March 19, 1952, came again the applicant, Railway Express Agency, Incorporated, by Thomas B. Gay, H. Merrill Pasco and W. H. Waldrop, Jr., its attorneys, and came also the Commonwealth, by Henry T. Wickham, Assistant Attorney General, and the State Corporation Commission, by Norman S. Elliott, its Counsel; and the Commission having heard all of the evidence, continued this case to permit counsel for the applicant and the Commonwealth to submit briefs.

[fol. 23] Now on this day, briefs having been filed by the parties, and the Commission, having considered the evidence

and the briefs submitted by counsel, is of the opinion and finds, for reasons stated in an opinion this day filed in this case and in Case No. 10629, by Catterall, Commissioner, and concurred in by Hooker, Chairman, and King, Commissioner, that the relief requested in the application filed herein should be denied.

It is, therefore, ordered:

(1) That the application of Railway Express Agency, Incorporated, for correction of assessment and refund of taxes for the year 1951, be denied, and this proceeding be dropped from the docket; and

(2) That attested copies hereof, together with copies of the opinion referred to herein, be sent to counsel for the applicant and to the Attorney General of the Commonwealth.

A True Copy. Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

Before the State Corporation Commission

OPINION—CATTERALL, COMMISSIONER

Railway Express Agency, Incorporated is a Delaware corporation, and Railway Express Agency, Incorporated, of Virginia, is a Virginia corporation. The Delaware corporation owns the stock of the Virginia corporation and since March 12, 1932, the Virginia corporation has carried on the intrastate express business in Virginia.

Since the creation of the Virginia company, both companies have paid the annual license tax imposed by § 58-547 of the Code, but the Delaware company has taken the position that the tax on it violates the commerce clause of the federal constitution. In 1930 (before the creation of the Virginia company) it raised this question in a petition to the State Corporation Commission. The Commission held the tax constitutional but reduced the amount of the tax measured by gross receipts from interstate business by about $41,000. Annual Report 1933, p. 9. The company did not appeal from that order, but for many years it has paid its taxes under protest, and, when the Supreme Court of

the United States on March 26, 1951, rendered its decision [fol. 24] in *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, the company was encouraged to try again to upset the tax.

By that time, more than three months had elapsed since it had received the certified copy of the assessment for 1950, and it was too late to apply for a refund under § 58-672. It applied under § 58-1122. The petition in the second case (for 1951) was filed within the three month's period.

In Case No. 10,629 we have to decide whether we have jurisdiction to entertain the petition, or whether the petition was filed too late. On the constitutional question, the issues in both cases are, of couse, the same; and both cases were heard together.

The Question of Jurisdiction in Case No. 10,629

We have come to the conclusion that the petition in Case No. 10,629 was filed too late and that the Commission has no jurisdiction to pass on it.

Title 58 of the Code covers the subject of taxation and Chapter 12 of that title deals with the taxation of public service corporations, although the chapter includes some taxpayers that are not corporations and some corporations that are not public service companies.

Article 4 of that Chapter imposes the taxes on express companies and Article 16 covers the subject of erroneous assessments. All references in this opinion to "articles" will refer to articles in Chapter 12 of Title 58.

Article 16, in § 58-672, provides for relief from erroneous assessments on "any transportation company, transmission company or other public service corporation."

As used in the constitution and laws of Virginia, "transportation company" is a word of art that does not have its ordinary dictionary meaning. For example, a common carrier by motor vehicle is not a transportation company. An express company is a transportation company.

Sec. 153 of the constitution says:

"* * * the term 'transportation company' shall include any * * * express company * * *"

Therefore, the petitioner is included in Article 16 as specifically as if Article 16 used the words "express company;"

and Article 16 is a specific law under which express companies may apply for relief from erroneous assessments made by the State Corporation Commission.

Section 58-1122, on which petitioner relies, is a general statute for the correction of taxes assessed by the State Cor- [fol. 25] poration Commission, and it allows a petition to be filed at any time within one year *after* the tax complained of has been *paid.* The words to be construed are:

"* * * unless and except as otherwise specifically provided * * *."

Section 58-1122 provides a catchall for cases not otherwise specifically provided for. It gives rights of review to individuals as well as corporations and to corporations that are not public service corporations. Our interpretation of the legislative intent is that a petition that can be filed under Article 16 cannot be filed under § 58-1122. So far as we know, the question now raised by petitioner has never been raised before. In the past, all petitions that could be filed under Article 16 were filed under that article.

The petition filed by petitioner in Case No. 4037, reported in our 1933 Annual Report at page 9, was filed under Section 235 of the Tax Code (Acts of 1928, p. 164), which is the source of Article 16. Proceeding under that section, petitioner got a refund of over $40,000, and yet the burden of petitioner's argument seems to be that that section does not relate to refund claims. At page 11 of its brief, petitioner says:

"But there are not any other specific statutory provisions *relating to the refund of license taxes paid by express companies.*"

At page 12 of its brief, petitioner says:

"Section 58-672 * * * does not specifically provide for *a claim for refund* of taxes *already paid.*"

Section 58-672 does not use the word "refund." It uses the words "review and correction." The only way to correct an assessment that has been paid is to refund the money, and Article 16, in § 58-675 expressly provides for the refund of taxes already paid. It says:

"* * * appropriate relief shall be granted, including the right to recover from the State or local authorities, or both, as the case may be, any excess of taxes that may have been paid. The order of the Commission shall be enforced by mandamus, or other proper process, issuing from the Commission."

[fol. 26] The writ of mandamus is a common law writ to compel a public officer to perform a ministerial duty. It does not issue to compel a private corporation to pay a tax, but does issue to compel a public officer or municipal corporation to refund a tax. Article 16 is a specific statute providing a complete remedy at law pursuant to which express companies can apply for and get refunds.

Petitioner argues that this remedy is not specifically provided for express companies because Article 16 does not contain the words "express companies." And it points to § 58-540 in Article 2 which mentions railway and canal companies and to § 58-616 in Article 10 which mentions water or heat, light and power companies.

Section 58-540, relating specifically to railways and canals, and § 58-616, relating specifically to water or heat, light and power companies, relate solely to relief in the Circuit Court of the City of Richmond. Neither section provides for relief on application to the State Corporation Commission, and both are unconstitutional. § 58-540 conflicts with Sec. 180 of the Constitution which provides that a railway or canal company "may, according to such course of procedure as may be prescribed by law, apply for relief first to the State Corporation Commission and *then* to the Circuit Court of the City of Richmond." § 58-616 conflicts with Sec. 156(d) of the Constitution which forbids any circuit court to "review, reverse, correct or annul any action of the Commission, within the scope of its authority."

Article 16 covers "any transportation company, transmission company or other public service corporation." Therefore railway and canal companies, and water or heat, light and power companies can seek relief under Article 16. § 58-676 (in Article 16) provides that all of them, *after review by the Commission*, can go to the Circuit Court of the City of Richmond. That provision appears to be unconstitutional as to all except railway and canal companies (Const.

Sec. 180). § 58-677 (in Article 16) provides that all parties may go to the Circuit Court of the City of Richmond "for relief from any original assessment without having first applied to the Commission for a review thereof." That section appears to be inconsistent with Sec. 156(d) of the Constitution.

Accordingly, railway, canal, water, heat, light, power and express companies are all specifically provided for in Article 16. All may petition under Article 16 and all must petition under Article 16. The argument based on the fact that express companies are not mentioned by name in Article 16 applies equally to all the others, because none of them is there specifically mentioned by name. A statute [fol. 27] that applies specifically to all transportation companies applies specifically to every transportation company. In legislating for a class, the legislature does not have to name every member of the class in order to make the law apply specifically to every member of the class. The class to which Article 16 applies consists of public service companies whose real estate and tangible property are assessed by the Commission, whose state franchise or license taxes are assessed by the Commission, and to whom the Clerk of the Commission is required by law to forward a certified copy of the assessment. The three months begins to run "after receiving a certified copy of such assessment of value or tax." The taxpayer has actual notice of the assessment before time begins to run against him.

Such taxes are assessed by the Commission after giving the taxpayers thirty days' notice that the assessment is to be made. See the following sections:

Railway and canal	§ 58-529
Express companies	§ 58-549
Freight car companies	§ 58-558
Sleeping cars	§ 58-566
Steamship lines	§ 58-582
Pipe lines	§ 58-590
Water, heat, light & power	§ 58-610
City bus lines	§ 58-647

The notice specifies the date when a hearing will be held on the assessments in the courtroom of the Commission.

Each taxpayer is given an opportunity to be heard. After the hearing the taxes are assessed by order of the Commission and copies of the assessments are printed and sent to the State Comptroller and to every city, town and country, and to each taxpayer. The sections of the Code relating to the certification of these assessments by the Clerk of the Commission are:

	To Comptroller and taxpayer	To cities, towns and counties
Railroads	§ 58-530	§ 58-538
Express companies	§ 58-550	§ 58-551
Freight cars	§ 58-559	None
Sleeping cars	§ 58-567	None
Steamships	§ 58-572	§ 58-573
Tel. & tel.	§ 58-583	§ 58-584
Pipe lines	§ 58-590	§ 58-592
Water, etc.	§ 58-611	§ 58-612
City bus	§ 58-648	§ 58-650

[fol. 28] Taxpayers falling in this class are thus notified in advance of the assessment that is about to be made, and each taxpayer receives an invitation to state his objections to the assessment before it is made. After the assessments have been made and printed copies are certified to all the interested parties. Article 16 then gives each taxpayer three months in which to file a petition for a review and correction of any item that he takes exception to. Article 16 provides the specific method for review and correction of the taxes thus assessed.

Petitioner bases two arguments on the wording of § 58-1122 on the mistaken assumptions (1) that the Commission assesses license taxes only against public service companies, and (2) that if the *res judicata* clause in § 58-1122 does not apply to proceedings under § 58-672, there is nothing else for it to apply to.

1. The first of these arguments is stated on page 10 of petitioner's brief:

"The General Assembly must have intended for at least some corporations to have a right to claim a refund of license taxes under Section 58-1122; otherwise that part of

the statute would be meaningless and presumably would not have been adopted by the General Assembly. Since the Commission assesses those taxes only against public service corporations it is apparent that the relief granted to such corporations by Section 58-672 cannot be exclusive."

The Commission assesses many taxes beside public service company taxes. Some of these taxes are called license taxes and are license taxes; others are not called license taxes and are license taxes.

For example, the taxes imposed by Articles 12 and 13 are called "road taxes" and are license taxes. If a motor carrier fails to pay these taxes, we revoke his privilege to use the highways.

The taxes imposed on insurance companies by § 58-486 are called license taxes and are license taxes. They are assessed by the Commission under § 58-497. If they are not paid, the Commission revokes the taxpayer's license to do business (§ 58-498).

These are examples of taxpayers who can claim refunds under § 58-1122.

The so-called "license" taxes imposed on express companies are the same kind of taxes as the "franchise" taxes imposed on railroads. Neither of them is a license tax, be- [fol. 29] cause neither is exacted as a condition of carrying on the business. A license tax is an excise tax that must be paid as a condition of carrying on a business or exercising a privilege.

2. The second of these arguments is stated on page 12 of petitioner's brief:

"Section 58-1122 provides that a refund of tax cannot be obtained 'after a formal adjudication in a proceeding in which the right of appeal existed and was not taken.' The quoted language must refer to a proceeding that could be brought under a section other than Section 58-1122 in which the decision was against the taxpayer; * * *."

The quoted language is merely a statement of the doctrine of *res judicata*. Many taxes assessed by the Commission are certified to the Comptroller for collection. If such a tax is not paid, the Comptroller causes suit to be brought against the delinquent taxpayer. If the decision in that

suit is against the taxpayer, he obviously cannot pay the tax and thereafter apply for a refund. The same principle applies to cases in which the Commission imposes penalties on taxpayers under § 58-635 and 58-642. If the penalty is imposed for failure to pay taxes, it would be a bar to an application for a refund of the same taxes. All decisions of the State Corporation Commission can be appealed.

Case No. 10,629 must be dismissed because the petition was not filed in time. We turn now to the constitutional question that is properly raised in Case No. 10,767.

The Constitutional Question

This case is governed by *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, appeal dismissed, 96 L. Ed. Adv. Ops. 578 (April 21, 1952).

Article 7, taxing steamship companies, and Article 4, taxing express companies, are so much alike that no distinction can be drawn between them. Petitioner, realizing that the decision of that case would control this case, filed a brief *amicus curiae* in that case. In that brief, petitioner said (p. 2):

"In view of the importance of the Court's ruling, both to the Appellees and to many other corporations operating in Virginia either entirely or partly in interstate commerce, Railway Express thought it in the public interest that this Court should have before it a full presentation of its viewpoint on the problems involved."

[fol. 30] The Supreme Court of Appeals, at page 68 of its opinion said:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is."

Except for poll taxes, all taxes are either excise taxes or property taxes. The reason it is necessary to decide whether a particular tax is an excise tax or a property tax is because of constitutional limitations. The constitution of the United

States, for example, provides, in effect, that all federal taxes on property must be apportioned among the several states in accordance with their respective populations, and that all federal excise taxes must not be so apportioned, but must be uniformly applied throughout the United States. Accordingly, the constitutionality of every federal tax depends on whether it is an excise tax or a property tax. Beginning with *Hylton* v. *United States*, 1 L. Ed. 556 in 1796, nearly every federal tax has been contested in the Supreme Court on the ground that it was not properly apportioned or was not properly uniform. In the great case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 759 (1895) the court held, five to four, that a general income tax was a property tax as to income from property and an excise tax as to income from earnings. That decision was reversed in 1913 by the 16th Amendment, and has never commanded universal respect. The Court of Appeals of Virginia refused to follow it in 1936 in *Hunton* v. *Commonwealth*, 166 Va. 229.

Beginning with decisions rendered by Chief Justice Marshall the Supreme Court has held that the commerce clause, which says that Congress shall have power to regulate interstate commerce, means that the states are forbidden to regulate interstate commerce. Since those decisions are based more on considerations of policy than of logic, they cannot be carried to a strictly logical conclusion; and ever since *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), it has been recognized that the states are free to regulate some parts of interstate commerce, namely those parts that the Supreme Court thinks it desirable that the states should be free to regulate. Proceeding from the field of regulation to the field of taxation, the Supreme Court has decided that a state tax on interstate commerce is a state [fol. 31] regulation of interstate commerce and is void if it goes too far. It is interesting to look at the actual words of the constitution and then contemplate the edifice the court has built on them.

Those words are:

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

With only those words to guide it the court has struck down countless state taxes on the ground that they impede the free flow of commerce more than they should, and has upheld countless state taxes on the principle that "interstate commerce must pay its way."

In this field of constitutional law the court itself, without any words in the constitution expressing or implying any such distinction, has drawn a line between excise taxes and property taxes. If the tax is an *excise* tax, the court may or may not strike it down, but if the tax is a *property* tax all is well: state taxes on property *used* in interstate commerce are upheld so long as the property is located in the taxing state. State property taxes that get by the due process clause do not run into trouble with the commerce clause.

So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, the court said (p. 70):

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

" 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare [fol. 32] bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set

out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause."

Commenting on this decision, the April, 1952, Virginia Law Review at page 423 remarks:

"It appears that the Court in the instant case preferred to sustain the tax on the ground that it was an *ad valorem* tax rather than on the ground that it was a privilege tax on a business not exclusively interstate in character. If the mental gymnastics employed by the Court are questioned, it may only be answered that this is not the first time such an approach to the problem has be-n used. If the Spector case is an indication of a return to the 'direct-indirect' test as to state taxation of interstate commerce, then the Court was wise in its choice of grounds."

We deprecate this suggestion that our highest court engaged in "mental gymnastics" to get around the *Spector* case. Long before the *Spector* case was heard of the franchise or license taxes on public service companies were regarded as property taxes.

Sec. 170 of the constitution provides:

"The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other property,* in whole or in part, of a transportation, industrial or commercial corporation."

If the framers of the constitution had not regarded franchise taxes as taxes on *property,* they could not have used the words "*other* property."

(§ 58-553 makes the express company tax in lieu of other taxes. By virtue of that section express companies escape the tax on their rolling stock.)

[fol. 33] The franchise or license taxes imposed on public service companies are taxes on *intangible* property.

In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55 at page 69 the court said:

"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

' "The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible" value of the company." ' "

An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) as follows:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property."

* * * * * * *

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible prop-

[fol. 34] erty, that it is something of no value, is to insult the common intelligence of every man."

• • • • • • •

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

At the 1952 session of the General Assembly, Article 7, imposing taxes on steamship carriers, was rewritten; and petitioner argues that the amendment amounts to a legislative declaration that the Supreme Court of Appeals had misinterpreted the intent of the legislature. At page 27 of its brief petitioner says:

"Applicant is of course aware of the decision of the Supreme Court of Appeals in the *Baltimore Steam Packet Company* case, supra, that a quite similar tax on steamship and other water carriers was not a privilege tax but a property tax on the going concern value of such companies. This Honorable Commission would undoubtedly be bound by that decision in applying the statute to any other *steamship* company, except for the action of the General Assembly at its 1952 Session in amending the gross receipts tax on such companies (Sec. 58-575 of the Code of Virginia) so as to provide that such tax should apply *only* to gross receipts

derived from *intrastate* commerce in Virginia. The effect [fol. 35] of this amendment is to nullify at the earliest opportunity the decision of the Court of Appeals in the *Baltimore Steam Packet Company* case and clearly establishes the legislative *intent* that the tax there involved was never intended to apply to gross receipts earned from *interstate* commerce. Applicant therefore respectfully submits that the action of the General Assembly in amending Section 58-575 of the Code of Virginia (subsequent to and in the light of the opinion of the Supreme Court of Appeals in the *Baltimore Steam Packet* case) definitely establishes the *nature* of that tax to be a *privilege* tax, rather than a property tax. *The tax on express companies under consideration here is so similar as to be subject to the same interpretation.*"

This argument about legislative "intent," when broken down into its component parts, asserts three things:

1. The legislature wanted to "nullify" the court's decision. The word "nullify" is used to create the impression that the legislature was trying to wipe the decision off the books retroactively.

2. The tax was "never intended to apply to gross receipts from *interstate* commerce." This is saying that the legislature amended the law for the purpose of changing its meaning retroactively. The argument asserts that although the statute expressly covered interstate commerce, the legislature never intended it to cover interstate commerce.

3. The legislature, having learned that the tax is constitutional because it is a property tax, quickly amended the law for the purpose of expressing its desire that the Court of Appeals hold unconstitutional the tax on express companies.

Of course, in seeking the "intent of the legislature", we are not looking for what was in the back of the minds of the legislators. The intent of the legislature must be found in the words used by the legislature, and the object of interpretation is to discover the ***meaning*** of those words.

The words in question are:

"* * * all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State * * *."

Petitioner asks us to hold that the General Assembly, by amending the statute in 1952, intended to say that its words [fol. 36] "business passing through, into or out of this State" were never intended to describe anything but intrastate movement. Such an interpretation is impossible.

Petitioner asks us to hold that the 1952 amendment was intended to be retroactive and to "nullify" the decision of the Court of Appeals. If the decision were really nullified, it could not be enforced, and the steamship companies would not have to pay the 1950 and 1951 taxes. But the new statute (Chapter 486, Acts of 1952) concludes:

"These sections as amended shall go into effect as of the beginning of the first day of January, nineteen hundred fifty-three."

Not only has the legislature not nullified the 1950 and 1951 assessments: it has declared that the taxes shall be assessed for 1952, and has thereby expressed its agreement with the court that the tax measured by interstate earnings is valid.

This amendment was not adopted for the purpose of expressing disapproval of the court's interpretation of the law but for the purpose of encouraging navigation in the great port of Hampton Roads. That was a subject prominently before the 1952 General Assembly. The legislature toured Hampton Roads in a body and passed a law (Chap. 61, Acts of 1952) to create the "Virginia State Ports Authority" to encourage the development of the ports. As one means of promoting that public policy, the legislature reduced the taxes on steamship lines beginning with the year 1953. Since the Court of Appeals had just held that the license tax imposed by §58-575 was not a privilege tax, the General Assembly, when it amended §58-575, left out the word "privilege" for the purpose of making it clear that it agreed with the holding of the court that these taxes are not in fact privilege taxes. Petitioner's argument that we should now hold that the legislature was trying to make unconstitutional the franchise and license taxes on which so large a part of the state's revenue depends is as topsy-turvy as the upside-down fraction in the apportionment formula.

Unquestionably, the fraction described in § 58-575 for

steamship lines and in §58-547 for express companies is upside down. Many people find it confusing to describe ratios and this mistake is not uncommon. However, it is clear in both sections that the legislature meant to tax only a *part* of the total gross receipts. The legislature could not have intended to tax *more* than the total gross receipts. If one-[fol. 37] tenth of the gross receipts were earned in Virginia, the legislature intended to measure the tax by one-tenth of the gross receipts and not by ten times the gross receipts. The language of the steamship company fraction is more defective than that of the express company fraction. §58-575 uses the words:

"* * * that *proportion* of the total receipts * * *."

§ 58-547 uses the words:

"* * * that *portion* of the total receipts * * *."

Thus, the express company formula contains within itself a word stating the intent of the legislature to tax only a *portion* of the gross receipts.

The actual measure of the tax is stated in § 58-547:

"When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; * * * "

The proviso:

"* * * unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts * * *."

merely points out a method of computing the amount of receipts earned in Virginia. The taxing statute is complete in itself without the proviso, and the proviso itself directs that the formula be not used if it be clearly shown that application of the formula would result in taxing receipts that could not properly be deemed to have been earned within the State.

Heretofore, the Commission has acquiesced in the view that, because the density of express traffic is greater in other parts of the country than in Virginia, it would not be

fair to the company to employ the formula based on mileage. In recent years the Commission and the company have by mutual agreement employed a rough and ready formula that, because of changing conditions, is getting out of line and will have to be revised. The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was [fol. 38] assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low.

The *Spector* case does not invalidate any property taxes but only some excise taxes. Since the tax complained of is a property tax and not an excise tax, it is unnecessary to decide whether the Delaware corporation is doing an intrastate business in Virginia through the agency or instrumentality of the Virginia corporation.

A corporation is an imaginary person created under and by virtue of a statute that gives it eternal life and its stockholders limited liability. The command of the statute is that this fictitious creature shall be treated as if it were real. When courts, as they frequently do, ignore the corporate entity in order to achieve justice, they necessarily ignore the words of the statute creating the corporation, on the theory that the legislature could not have intended the corporate fiction to be used for a wrongful purpose. The Virginia Court of Appeals, in *Beale* v. *Kappa Alpha*, 192 Va. 382 at 399 summed up the law on the subject by quoting from a Texas case:

"'* * * Just when a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question of fact in each case. As above stated the general rule is that the separate corporate entity of corporations will be observed by the courts, even though one may dominate or control another, or may treat it as a mere department, instrumentality, agency, etc.; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.'"

The Delaware corporation created and uses the Virginia

corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia. Since the tax is a property tax it is constitutional even though the taxpayer does no intrastate business.

Hooker, Chairman, and King, Commissioner, concur.

[fol. 39] Before the State Corporation Commission

[Title omitted]

Order Directing Transmittal of Certain Exhibits—August 4, 1952

Case No. 10629
Case No. 10767

The Railway Express Agency, Incorporated, having filed due notice of appeal in these cases, and counsel for that corporation, the Attorney General of Virginia, by Henry T. Wickham, Assistant Attorney General of Virginia, and counsel for this -ommission having agreed that Exhibits 6, 7 and 8 in Case No. 10767 only accompany the record on appeal;

It is ordered that the exhibits mentioned, numbered and described as follows, be forwarded to the Clerk of Supreme Court of Appeals of Virginia to be returned by him to this commission with the mandate of that court:

Exhibit No.	Description
6	Railway Express Agency, Incorporated, Taxes and Assessments, Va., 1931 thru 1951.
7	Railway Express Agency, Incorporated, of Virginia, Taxes and Assessments, 1933 thru 1951.
8	Copy of letter, Dec. 10, 1942, and enclosure, from H. S. Marx to J. C. Masten.

A true copy. Teste: N. W. Atkinson, Clerk of the State Corporation Commission.

[fols. 40-42] Chairman's Certificate (Omitted in Printing)

[fol. 43] IN THP SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4036

PETITION FOR AN APPEAL FROM AN ORDER OF THE STATE CORPORATION COMMISSION—FILED AUGUST 12, 1952

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware corporation, respectfully represents that it is aggrieved by a final order entered by the State Corporation Commission on June 16, 1952, in Case Number 10,629, denying its petition for correction of assessments and refund of license taxes paid for the year 1950. A copy of said order appears in the copy of the record presented with this petition.

On July 3, 1952, counsel for Appellant filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to opposing counsel, counsel for the Commission and the Attorney General of Virginia.

Since the appeal here is of right, no statement of facts or assignments of error are made in the petition. There is *filed with this petition, as a part hereof, a certified* . . . . . *is* filed with this petition, as a part hereof, a certified copy of the pertinent portions of the record of the proceedings before the State Corporation Commission as determined by stipulation of counsel filed herewith. In addition, there fflfol. 44[are certified three of the original exhibits introduced at the hearing before the State Corporation Commission which are referred to in the stipulation.

WHEREFORE, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission, and enter an order correcting the assessment of and refunding the taxes paid by petition- . . . for the year 1950, in accordance with the prayer of the petition filed with the State Corporation Commission on July 16, 1951.

On August 11, 1952, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, and Norman S. Elliott, counsel for

the State Corporation Commission, on behalf of the Appellee herein.

Respectfully submitted, Railway Express Agency, Incorporated, By (S.) Thomas B. Gay, 1003 Electric Building, Richmond, Virginia, Its Attorney.

J. H. Mooers, W. H. Waldrop, Jr., H. Merrill Pasco, Of Counsel.

[fol. 45] I, H. Merrill Pasco, the undersigned counsel, duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corporation Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 11th day of August, 1952.

(S.) H. Merrill Pasco, 1003 Electric Building, Richmond, Virginia.

August 12, 1952

Appeal awarded as of right.

/s/ Willis D. Miller

[fol. 46] In The

Supreme Court of Appeals of Virginia

Record No. 4037

Petition for an Appeal From an Order of the State Corporation Commission—Filed August 12, 1952

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware Corporation, respectfully represents that it is aggrieved by a final order entered by the State Corporation Commission on June 16, 1952, in Case Number 10,767, denying its petition for correction of assessments and refund of license taxes paid for the year 1951. A copy of said order appears in the copy of the record presented with this petition.

On July 3, 1952, counsel for Appellant filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to opposing counsel, counsel for the Commission and the Attorney General of Virginia.

Since the appeal here is of right, no statement of facts or assignments of error are made in the petition. There is filed with this petition, as a part hereof, a certified copy of the pertinent portions of the record of the proceedings before the State Corporation Commission as determined by stipulation of counsel filed herewith. In addition, there are certified three of the original exhibits introduced at the [fol. 47] hearing before the State Corporation Commission which are referred to in the stipulation.

WHEREFORE, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission, and enter an order correcting the assessment of and refunding the taxes paid by petitioner for the year 1951, in accordance with the prayer of the petition filed with the State Corporation Commission on November 6, 1951.

On August 11, 1952, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, and Norman S. Elliott, counsel for the State Corporation Commission, on behalf of the Appellee herein.

Respectfully submitted, Railway Express Agency, Incorporated, By (S.) Thomas B. Gay, 1003 Electric Building, Richmond, Virginia, Its Attorney.

J. H. Mooers, W. H. Waldrop, Jr., H. Merrill Pasco, Of Counsel.

[fol. 48] I, H. Merrill Pasco, the undersigned counsel, duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corporation Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 11th day of August, 1952.

(S.) H. Merrill Pasco, 1003 Electric Building, Richmond, Virginia.

August 12, 1952

Appeal awarded as of right.

/s/ Willis D. Miller

EXHIBIT No. 6
Case No. 10767
Filed March 19, 1952
Witness—Gross Bailiff—Saunders

Railway Express Agency, Incorporated

Taxes and Assessments
State of Virginia

Year (a)	Gross Receipts Reported (b)	State License Tax Paid on Gross Receipts (c)	Money On Deposit (d)	Taxes Paid on Money on Deposit (e)	Reported Value of Real and Tangible Personal Property (f)	Assessment on Real and Tangible Personal Property (g)	Taxes Paid on Real and Tangible Personal Property (h)
1931.....	$ 3,811,395.55	$40,138.18	$127,900.00	$255.80	$142,708.52	$137,144.00	$3,497.88
	⁂(2,432,616.75)						
1932.....	*3,811,395.55	35,594.19	20,460.80	40.92	136,634.41	130,739.00	3,244.03
	⁂(2,157,223.70)						
1933.....	1,034,175.00	18,033.21	11,141.00	22.82	82,107.61	86,048.00	2,128.02
1934.....	1,010,013.00	16,665.21	12,965.00	25.93	79,984.44	84,601.00	2,091.08
1935.....	1,010,877.00	16,679.47	12,880.00	25.76	68,229.89	77,946.00	1,945.68
1936.....	1,091,721.00	18,013.40	7,805.00	15.61	56,905.21	80,986.00	1,971.13
1937.....	1,143,198.00	18,862.77	12,585.00	25.17	79,472.90	63,274.00	1,470.52
1938.....	1,140,692.00	18,821.42	12,795.00	25.79	87,265.03	66,581.00	1,786.49
1939.....	1,270,795.66	20,968.13	26,795.00	53.59	107,113.74	82,107.00	1,914.73
1940.....	* 860,000.00	27,876.88	30,869.00	61.74	113,102.78	84,481.00	1,944.38
	⁂(1,689,507.60)						
1941.....	* 860,000.00	28,672.17	40,082.48	80.16	120,131.98	87,461.00	2,065.77
	⁂(1,737,707.40)						
1942.....	900,000.00	31,593.06	35,944.29	71.89	132,058.95	93,498.00	2,831.92
	⁂(1,914,730.86)						
1943.....	2,538,933.12	41,892.40	28,438.48	56.88	169,143.15	117,647.00	2,873.74
1944.....	3,414,865.06	56,345.27	61,493.37	122.99	152,012.83	111,594.00	2,708.37
1945.....	3,910,361.97	64,520.97	62,794.33	125.59	141,382.33	115,224.00	2,792.59
1946.....	4,265,031.80	70,373.02	56,878.56	113.76	130,529.10	126,167.00	3,103.26
1947.....	4,181,863.68	69,000.75	84,612.25	169.22	195,460.71	130,723.00	3,344.49
1948.....	4,270,728.28	70,467.02	79,091.51	158.18	192,458.88	127,516.00	3,312.82
1949.....	4,106,518.78	88,290.15	78,615.15	157.23	180,771.81	120,803.00	3,150.99
1950.....	3,286,775.70	70,665.68	66,445.71	132.89	175,810.54	119,979.00	3,257.69
1951.....	3,090,916.55	66,454.71	109,906.38	219.81	193,775.70	129,279.00	3,389.65

* Amount reported.
⁂ Amount assessed.

BLEED THROUGH

[fol. 50]

EXHIBIT No. 7
Case No. 10767
Filed March 19, 1952
Witness—Gross Saunders—Bailiff

Railway Express Agency, Incorporated of Virginia

Taxes and Assessments

Year (a)	Gross Receipts Reported (b)	State License Tax Paid on Gross Receipts (c)	Money On Deposit (d)	Taxes Paid on Money on Deposit (e)	Reported Value of Real and Tangible Personal Property (f)	Assessment on Real and Tangible Personal Property (g)	Taxes Paid on Real and Tangible Personal Property (h)
1933.....	$ 224,944.50	$ 3,712.41	$ 5,000.00	$10.00	—	—	—
1934.....	270,400.86	4,461.61	5,000.00	10.00	—	—	—
1935.....	333,055.97	5,495.42	5,000.00	10.00	—	—	—
1936.....	353,859.69	5,838.68	5,000.00	10.00	—	—	—
1937.....	419,128.97	6,915.63	5,000.00	10.00	—	—	—
1938.....	420,969.53	6,946.00	5,000.00	10.00	—	—	—
1939.....	455,464.82	7,515.17	5,000.00	10.00	—	—	—
1940.....	534,390.39	8,817.44	5,000.00	10.00	—	—	—
1941.....	571,645.26	9,432.15	5,000.00	10.00	—	—	—
1942.....	657,396.71	10,847.05	5,000.00	10.00	—	—	—
1943.....	827,080.19	13,646.82	23,871.75	47.56	—	—	—
1944.....	945,619.00	15,602.71	2,986.16	5.97	$20,700.00	$24,500.00	$586.90
1945.....	1,012,600.63	16,707.91	1,838.18	3.68	20,700.00	24,500.00	586.90
1946.....	1,047,838.92	17,289.34	2,665.90	5.33	20,700.00	24,500.00	586.90
1947.....	1,163,375.81	19,195.70	2,671.00	5.34	20,700.00	24,500.00	586.90
1948.....	1,236,392.60	20,400.48	2,853.56	5.71	20,700.00	24,500.00	630.90
1949.....	987,161.57	21,223.97	3,275.79	6.55	20,700.00	26,500.00	583.00
1950.....	949,298.77	16,109.92	3,944.48	7.89	20,700.00	26,500.00	583.00
1951.....	622,211.90	13,377.56	2,709.83	5.42			

[fol. 51] Case No. 10767

EXHIBIT No. 8

Filed March 19, 1952

Gross
Witness
Saunders
Bailiff

December 10, 1942

Mr. J. C. Masten
First Assistant Assessor
State Corporation Commission
Richmond, Virginia

Dear Mr. Masten:

Attached is the memorandum dictated in my office today following the conference which we had with you and Mr. Drummond regarding the future taxes of this Company. If it is not entirely satisfactory to you it will be appreciated if you will kindly advise me.

With kindest regards,

Sincerely yours,

Original letter signed H. S. Marx.

bcc to Mr. Thomas B. Gay
bcc to Mr. W. A. Benson
HSM/CT

• • •

[fol. 52] New York, December 10, 1942

Report will be made as heretofore, including protest and showing gross system receipts, including truck and air receipts. The mileage will be shown as heretofore, showing similarly air line mileage and motor truck mileage.

For 1943 the Commission will increase its 1942 assessment of $1,914,730.86 by the percentage in which the system reported gross receipts increase for the year ending December 31, 1942. This will be done regardless of any variations in mileage, and this procedure will be continued each year thereafter, the Commission increasing or decreasing its assessment in accordance with the percentage of increase

or decrease of system gross receipts until the Commission or the Express Company desires a reconsideration of the method, it being understood, however, that if there is a decline in receipts following termination of the present war the Commission will not seek to hold the taxes up to the level of the preceding years.

[fol. 53] In the Supreme Court of Appeals of Virginia:

(The following is an extract from appellant's opening brief, pages 8 and 9 thereof, filed November 12, 1952.)

ASSIGNMENT OF ERRORS AND STATEMENT OF QUESTIONS INVOLVED

In compliance with Rule 5:11 of this Court, Appellant assigns the following errors in these cases:

1. The Commission erred in holding § 58-672 to be the exclusive remedy of public service corporations seeking correction of tax assessments and refunds of taxes actually paid, and denying the Appellant the right to proceed under § 58-1122 for a refund of the tax paid for 1950.

2. The Commission erred in the case concerning the 1951 tax:

(a) In holding the tax imposed under § 58-547 to be a property tax rather than a license tax;

(b) In sustaining the validity of the apportionment formula of § 58-547; and

(c) In holding the tax imposed under § 58-547 applicable to Appellant even if it be a property tax since Appellant has no going concern or intangible value.

There are therefore presented in these two appeals the following questions:

1. Is § 58-672 the exclusive remedy for public service corporations seeking correction of assessment and refund of taxes actually paid to the Commonwealth?

2. Is the tax imposed under § 58-547 a property tax or a license tax?

3. Is the apportionment formula of § 58-547 valid?

4. Does Appellant have a going concern or intangible

value which can lawfully be made the subject of a property tax in this State?

[fol. 54] Before the Supreme Court of Appeals of Virginia at Richmond.

Present, All the Justices.

Railway Express Agency, Inc. v. Record Nos. 4036, 4037, Commonwealth of Virginia:

OPINION BY JUSTICE LEMUEL F. SMITH—MARCH 9, 1953
FROM THE STATE CORPORATION COMMISSION

The appellant, Railway Express Agency, Incorporated, filed two applications with the State Corporation Commission seeking the correction of assessments of State taxes made against it by the Commission and the refund of taxes paid for 1950 of $70,665.68 and for 1951 of $66,454.71, which taxes were measured by gross receipts from business done in Virginia under the provisions of Code, § 58-547[1]. The

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[1] "§ 58-547. Annual license tax.—Every such company, [express company] for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1826, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p.924.)"

applications were made on the ground that the assessments were invalid, because they constituted a burden on interstate commerce in violation of the Commerce Clause of the [fol. 55] Federal Constitution, art. 1, § 8, cl. 3.

The appellant contends that § 58-547 imposes a license tax upon the privilege of carrying on a business exclusively interstate in character and, therefore, is violative of the Federal Constitution; that the apportionment formula provided in § 58-547 is invalid; and that, if the tax assessed under § 58-547 is a property tax, the appellant has no going concern value on which such a tax could lawfully be levied.

Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931, following the affirmance by this court[2] of an order of the State Corporation Commission which denied the appellant the authority to do an intrastate express business in this State.

[fol. 56] The application for correction of assessment and refund of taxes paid for the year 1950 was dismissed by the Commission, because it was not filed within the time prescribed by Code, § 58-672, the Commission therefore being without jurisdiction to grant the relief requested. The appellant contended before the Commission, as it does here, that Code, § 58-1122 provides an alternative procedure under the terms of which its application was filed within the time provided.

It is not, however, necessary for us to decide whether the petition was timely filed; for even if we assume that the appellant has proceeded correctly under a proper statute, it is not entitled to the relief sought for the reasons hereinafter stated.

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[2] *Ry. Ex. Agy.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450.

The Commission also denied the relief sought in the case of the 1951 assessment, holding that its decision was governed by *Commonwealth* v. *Balto. Steam Packet Co.,* 193 Va. 55, 68 S. E. (2d) 137, *app'l dismissed,* 343 U. S. 923, 72 S. Ct. 763, 72 S. Ct. 764, 96 L. Ed. 1335.

The *Balto. Steam Packet* case arose out of appeals by the Commonwealth of Virginia from two adverse decisions of the State Corporation Commission which held invalid the State taxes assessed under the provisions of Code, § 58-575 against two steamship companies, which taxes were meas- [fol. 57] ured by gross receipts from interstate business done in Virginia. The steamship companies were engaged in both interstate and intrastate commerce, although their intrastate commerce produced only a small fraction of their total revenue. The principal issue in the case centered on the taxpayers' contention that the taxes assessed on receipts from interstate commerce apportioned to business done in this State was a violation of the Commerce Clause. The steamship companies argued that the tax was an annual license tax levied on their gross receipts for the privilege of doing an interstate business in this State and they pointed to the language of § 58-575 which did, at that time, denominate the tax an annual license "for the privilege of doing business in this State."

After discussing the pertinent decisions of the Supreme Court of the United States dealing with the very controversial subject of State taxation as a burden on interstate commerce, we decided in the *Balto. Steam Packet* case that if a tax "is in substance and effect a fairly apportioned tax on property, it is valid." In answer to the question then presented—What kind of tax is levied by § 58-575—we pointed out in the course of our opinion that it is the [fol. 58] operation of the statute and not its descriptive label that governs the character of a tax and concluded that § 58-575 provides for a property tax, not a license tax for the privilege of doing business, in these words: "In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed." 193 Va. at p. 70. This holding was based on analysis of the numerous decisions of the Supreme Court

of the United States discussed in the opinion which recognize the principle that the going concern value of a business is taxable although the individual physical properties from which it arises are used in interstate commerce.

The appellant filed a brief as *amicus curiae* in the *Balto. Steam Packet* case wherein it vigorously upheld the contention of the taxpayers that the tax levied under § 58-575 was invalid. At the oral argument of the case at bar it conceded that this case is on all fours with the case involving the water carriers except that the appellant here does no intrastate business.

In *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 71 S. [fol. 59] Ct. 508, 95 L. Ed. 573, the rule is laid down that a State tax upon the privilege of carrying on a business exclusively interstate in character violates the Commerce Clause no matter how fairly it is apportioned to business done within the State.

However, the tax levied under the provisions of Code, § 58-547 is not a tax upon the privilege of carrying on a business exclusively interstate in character. Like the tax imposed by Code, § 58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer arising out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. Ed. 1031; *Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654.

[fol. 60] The appellant argues that the action of the General Assembly in amending § 58-575 (applicable to steamship and other water carriers) the month following the decision of this court in the *Balto. Steam Packet* case definitely established the legislative intent to impose that tax as a privilege rather than as a property tax. See Acts of 1952, ch. 486, p. 780. The amendment of § 58-575 deleted

the words "for the privilege of doing business in this State," and then went on to make the tax applicable only to gross receipts derived from intrastate business. We do not see any indication in this amendment of a legislative intent to change the nature of the tax as defined by this court immediately prior to the amendment. For reasons sufficient unto itself, perhaps to encourage the development of the harbors and waterways of Virginia or because for many years the tax on interstate receipts had not been enforced, the legislature changed the law as it applied to steamship and other water carriers, but made no changes in the almost identical statute which applies to express companies. And this was done notwithstanding the fact that the legislature had before it the decision in the *Balto. Steam Packet* case [fol. 61] which stated in the following language that the rule of the case as regards steamship and other water carriers would also apply to express companies:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is." 193 Va. at p. 68.

Furthermore, says the appellant, if the gross receipts taxes imposed by § 58-547 (express companies) and § 58-575 (steamship and other water carriers) are in fact property taxes, then § 58-575, as amended in 1952, fails to tax the going concern value which is produced by the interstate business of steamship and other water carriers and consequently is in conflict with § 168 of the Constitution of Virginia which provides that "All property, except as hereinafter provided, shall be taxed"; there being no subsequent provision of the Constitution exempting the property of steamship and other water carriers. If, on the other hand, continues the appellant, these taxes are privilege [fol. 62] taxes, the 1952 amendment of § 58-575 results in no unlawful attempt to exempt property from taxation.

Of course, we do not have before us the question whether § 58-575 violates § 168 of the Constitution, but merely the argument that if § 58-547, and § 58-575 as amended, impose property taxes, the latter is in conflict with § 168 of the

Constitution. When we are confronted with the question of the constitutionality of the 1952 amendment of § 58-575 we will deal with it.

Continuing its argument as to the nature of the tax imposed by § 58-547, the appellant contends that if the taxes levied by the State on the gross receipts of public service corporations are property taxes on the going concern value of such taxpayers rather than privilege taxes, then such taxes are violative of § 171 of the Constitution of Virginia to the extent that they are levied on the going concern value produced by or derived from the physical properties of such corporations, since property of this class and kind is specifically segregated to the localities for taxing purposes. However, as heretofore stated, the *Balto. Steam Packet* case held specifically that the tax involved was a State tax on [fol. 63] *intangible* property which is measured by the gross receipts derived from the use of the physical properties which are taxed by the localities. Intangible property is not segregated to the localities, but is a proper subject of State taxation.

The appellant also asserts the invalidity of the tax on the ground that the apportionment formula provided in § 58-547 is an improper fraction, its numerator being larger than its denominator, with the result that if the formula were applied as written, the State would subject to the tax more than 100% of the total gross receipts of the appellant, regardless of where earned. And it was mandatory, continues the appellant, to use the formula in computing the tax, because nowhere in the record are the gross receipts from business done in Virginia clearly shown.

The identical type of fraction was contained in § 58-575, prior to the 1952 amendment, and the same argument was used in the *Balto. Steam Packet* case. Neither in that case nor the one now before us was the formula used in computing the tax complained of. The 1950 tax herein involved was paid under a form of protest which included this sentence: "The $3,286,775.70 reported as 'All receipts earned in Virginia on business passing through, into or out of this [fol. 64] State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of

this Company against any tax being levied upon, or measured by such receipts." A similar provision was included in the protest filed with the payment of the 1951 tax. The opinion of the Commission states that it has acquiesced in the view that because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the taxpayer to employ the formula based on mileage. The opinion further states that "The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low." The appellant states in the aforesaid form of protest that it has no way of ascertaining how much of its receipts is applicable to business passing through, into or out of this State. Section 58-547 provides that if the actual receipts from business done in Virginia are not clearly shown, the amount appli- [fol. 65] cable to the tax shall be computed according to the formula. The formula was not used in this case because, in the opinion of the Commission, it would have been inequitable to apply it. Instead a method was used which the appellant prefers to call an "understanding" between it and the Commission which resulted in a tax admittedly lower than it would have been had the formula been used. In fact, the Commission asserts that the tax assessed is less than it would have been even if the appellant had been able to compute its gross receipts resulting from business done in this State. It is not necessary in this case to resort to the formula to compute the tax. Mr. Justice Buchanan in the *Balto. Steam Packet* case called attention to the improper fraction, its numerator being greater than its denominator and said, "That, of course, was not intended." Section 58-575 there referred to has since been amended as pointed out before. The attention of the General Assembly is again called to this matter.

As its final argument the appellant contends that if the tax is a property tax rather than a license tax appellant's property has no going concern value in the generally accepted sense of that term, hence there is no intangible value

on which the tax herein complained of can lawfully be [fol. 66] levied. In short, if this is a property tax, appellant has no property of the type subject to it.

All of the appellant's capital stock is owned by sixty-eight railroad companies and it follows that the policies of the appellant, including the fixing of rates, are determined by the stockholding railroad companies, subject of course to governmental regulation.

The appellant's going concern value, or lack of it, was not an issue before the State Corporation Commission. The question was not raised in the appellant's applications, nor was it mentioned at the hearing before the Commission or in the appellant's memorandum submitted for the Commission's consideration. Naturally, it was not discussed in the Commission's opinion and the question has at no time been considered by the Commission. However, Commissioner Catterall said in the opinion of the Commission while discussing intangible property values: "An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature [fol. 67] of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) * * *." Thus, that judicial tribunal on the facts before it held that the express company had a going concern value.

Finally, as we have said before, the steamship companies in the *Balto. Steam Packet* case contended that Code, § 58-575 was invalid because it violated the Commerce Clause. No question was raised in that case about the tax on business beginning and ending in this State. The companies paid the tax on their intrastate business without question. The challenge was directed to the tax on all receipts earned in this State on business passing through, into or out of this State. Thus, the only gross receipts considered were those derived from interstate commerce. In the instant case the only business taxed under § 58-547 was interstate business, for the appellant did no intrastate business. The issue, therefore, presented in the case of the steamships and

the case at bar, is the same and arose under statutes almost identical in language and operation.

[fol. 68] Under the decision of the *Balto. Steam Packet* case, it is clear that the provisions of § 58-547 impose a valid property tax on the appellant measured by the gross receipts earned on business done in Virginia.

It follows from what has been said that the orders of the Commission appealed from are affirmed.

Affirmed.

[fol. 69] In the Supreme Court of Appeals of Virginia, Court-Library Building.

Record No. 4036

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant

against

COMMONWEALTH OF VIRGINIA, Appellee

Upon an appeal as of right to an order entered by the State Corporation Commission on the 16th day of June, 1952.

MANDATE—MARCH 9, 1953

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged and ordered that the same be and is hereby affirmed and that the appellant pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

—— ——, Clerk.

[fols. 70-71] In the Supreme Court of Appeals of Virginia, Court-Library Building.

Record No. 4037

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant

against

COMMONWEALTH OF VIRGINIA, Appellee

Upon an appeal as of right to an order entered by the State Corporation Commission on the 16th day of June, 1952.

MANDATE—MARCH 9, 1953

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged and ordered that the same be and is hereby affirmed and that the appellant pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

—— ——, Clerk.

[fol. 72] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record Nos. 4036, 4037

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES, ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL.—May 21, 1953.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States:

I.

Petition for Appeal

Railway Express Agency, Incorporated, a Delaware corporation, the Appellant herein, considers itself aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, dated and entered on the 9th day of March, 1953, in the above entitled cause, affirming the final orders of the State Corporation Commission of Virginia, rendered June 16, 1952, denying the applications of Appellant for refunds of license taxes assessed under Section 58-547 of the Code of Virginia, 1950, for the years 1950 and 1951 and [fol. 73] paid by Appellant under protest in the amounts of $70,665.68 and $66,454.71, respectively, presents this petition within ninety (90) days after March 1, 1953, as required by Section 2101(c) of the Judicial Code and Judiciary (28 U. S. C. 2101(c)), and respectfully shows:

(1) That this final judgment was rendered by the highest court of Virginia in which a decision could be had, in which there was drawn in question the validity of a statute of Virginia on the grounds of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity;

(2) That the statute, the validity of which was so drawn in question, was an Act of the General Assembly of Virginia, approved April 2, 1948 (Acts of the General Assembly of Virginia, 1948, Chapter 466, page 923; Section 58-547 of the Code of Virginia, 1950), which is an amend-

ment and reenactment of the annual license tax imposed upon express companies by Virginia for many years;

(3) That the statute imposes "an annual license tax" on express companies "for the privilege of doing business in this state" of an amount equal to two and three-twentieths per centum upon the gross receipts from operations of such companies within Virginia. The statute provides that when such an express company is operating partially within and partially without Virginia, the gross receipts within the State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or [fol. 74] out of the State; provided, unless otherwise clearly shown, "such last mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this state";

(4) That Appellant is engaged in the express business both interstate and intrastate in every state of the Union except Virginia, *where it is engaged solely in interstate commerce;*

(5) That the ground of the asserted invalidity of the statute is that, as applied to the Appellant in this case, it is repugnant to the commerce clause of the Constitution of the United States.

(6) That therefore the Appellant respectfully shows the Court that this case is one in which, under Section 1257(2) of the Judicial Code and Judiciary (28 U.S.C. 1257(2)), review may be had in the Supreme Court of the United States by appeal.

(7) That a petition for allowance of this appeal was presented to the Honorable Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia and by him disallowed by orders dated May 21, 1953, attached hereto as Exhibit A.

Wherefore, Appellant prays that an appeal be allowed to the Supreme Court of the United States from said final judgment upon Appellant giving bond with the requisite [fol. 75] surety therefor in an amount to be fixed by this Court and that citation be issued in accordance with law.

II.

Assignments of Error

The Appellant assigns the following errors in the record and proceedings in said case growing out of the action of the Supreme Court of Appeals of Virginia:

(1) In giving judgment affirming the final orders of the State Corporation Commission rendered June 16, 1952, thereby sustaining the validity of Section 58-547 of the Code of Virginia, 1950, in so far as it purports to authorize the assessment of a tax upon the gross receipts of Appellant derived solely from interstate commerce; and

(2) In failing to hold that Section 58-547 of the Code of Virginia, 1950, was a privilege or excise tax which, in so far as it purports to authorize the assessment of the tax therein provided against Appellant, constitutes a violation of the commerce clause of the Constitution of the United States.

III.

Prayer for Reversal

For which error Appellant prays that the judgment of the Supreme Court of Appeals of Virginia, dated and entered the 9th day of March, 1953, in the above entitled [fol. 76] cause, be reviewed and reversed and that judgment be rendered in favor of Appellant and for costs.

This the 21st day of May, 1953.

Railway Express Agency, Incorporated, *Appellant*,
J. H. Mooers, 230 Park Avenue, New York, N. Y.;
Thomas B. Gay, 1003 Electric Bldg., Richmond, Va.;
William H. Waldrop, Jr., 230 Park Avenue, New York, N. Y.

H. Merrill Pasco, 1003 Electric Bldg. Richmond, Va., of Counsel.

[fol. 77] EXHIBIT A TO PETITION

Virginia: In the Clerk's Office, Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 21st day of May, 1953.

Virginia: Before Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on the 20th day of May, 1953, in vacation of said court.

Record No. 4037

RAILWAY EXPRESS AGENCY, INC., Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee.

ON PETITION FOR AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On consideration of the petition for an appeal herein to the Supreme Court of the United States, it is ordered that the said petition be, and the same is hereby, denied.

/s/ Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

A Copy, Teste: H. G. Turun, Clerk.

[fol. 78] Virginia: In the Clerk's Office, Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 21st day of May, 1953.

Virginia: Before Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on the 20th day of May, 1953, in vacation of said court.

Record 4036

Railway Express Agency, Inc., Appellant,

against

Commonwealth of Virginia, Appellee.

On Petition For An Appeal To The Supreme Court Of The United States

On consideration of the petition for an appeal herein to the Supreme Court of the United States, it is ordered that the said petition be, and the same is hereby, denied.

/s/ Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

A Copy, Teste: H. G. Turun, Clerk.

[fols. 79-140] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal To The Supreme Court Of The United States—May 28, 1953

The Appellant in this cause, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the judgment made and entered in this cause by the Supreme Court of Appeals of the State of Virginia on the 9th day of March, 1953, with respect to petitions for refund of certain state taxes for 1950 and 1951, having presented its assignments of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant

to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

Now, therefore, it is hereby ordered that said appeal be and the same hereby is allowed as prayed for.

[fol. 141] It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

Fred M. Vinson, Chief Justice.

May 28, 1953.

[fols. 142-147] Citation in usual form showing service on Frederick T. Gray omitted in printing.

[fols. 148-165] Statement directing attention to the provisions of paragraph 3, rule 12, of the rules of the Supreme Court (omitted in printing).

[fols. 166-167] *Praecipe* for Transcript of Record (omitted in printing).

[fol. 168] Triplicate certificate (omitted in printing).

[fols. 169-171] Supreme Court of th United States, October Term, 1953

No. 163

[Title omitted]

Statement of Points To Be Relied Upon and Designation of Parts of Record to be Printed—Filed July 8, 1953

1. Appellant adopts for its Statement of Points upon which it intends to rely on its appeal to this Court the

points contained in its Assignment of Errors heretofore filed.

2. Appellant designates the entire record herein for printing by the Clerk of this Court.

Thomas B. Gray, H. Merrill Pasco, Attorneys for Appellant.

Service of the above statement of points to be relied upon and designation of parts of record to be printed accepted and acknowledged this 7th day of July, 1953.

Frederik T. Gray, Assistant Attorney General.

[fol. 172] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 163

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.

No. 165

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

STATEMENT AS TO JURISDICTION

J. H. Mooney,
Thomas R. Gay,
William H. Watkins, Jr.,
H. Merrill Pace,
Counsel for Appellant.

Watkins, Williams, Anderson,
Gay and Mooney,
Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the Supreme Court of Appeals of Virginia in this cause.

Opinion Below

The opinion of the Supreme Court of Appeals of Virginia here appealed from was dated and entered March 9,

1953, and is reported in 194 Va. 757, and 75 S. E. 2d 61. A copy of the opinion is attached hereto as Appendix A, page 24.

State Statute Involved

The statute of the State of Virginia, the validity of which is involved, is a portion of an act of the General Assembly of Virginia, approved April 2, 1948 (Acts of the General Assembly of Virginia, 1948, Chapter 466, Section 219(d), page 924; Section 58-547 of the Code of Virginia, 1950).[1] It is an amendment and re-enactment of the annual license tax based upon gross receipts which has been imposed on express companies by the State of Virginia for many years. The statute, herein referred to as "§58-547", provides in full as follows:

> "§58-547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.
>
> "The provisions of this section shall apply to the

[1] Section 219 of Chapter 466 of the Acts of 1948 appears as Article 4 of Title 58 of the Code of Virginia, 1950. The full text of Article 4 is attached hereto as Appendix B.

assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

Statement of the Case

Appellant operates interstate between all the forty-eight states of the United States and the District of Columbia and *operates intrastate within all of the states except Virginia.* The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498 (1929) and by the Supreme Court of the United States, 282 U. S. 440 (1931). Following that decision, Appellant organized a wholly owned subsidiary in Virginia, Railway Express Agency, Incorporated, of Virginia, to conduct only an express transportation business in intrastate commerce in this state.

Since its organization, the Virginia Company has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it in *intrastate* commerce in Virginia as well as the license tax imposed under §58-547, for the privilege of doing business in Virginia, based on its gross receipts from operations in this state.

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was in *interstate* commerce and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the license tax imposed under § 58-547 *for the privilege* of doing an interstate business in Virginia.

Although this license tax ostensibly has been assessed pursuant to §58-547 or its antecedent sections of the Code, it has in fact been assessed pursuant to informal understandings resulting from frequent conferences and discussions with the State Corporation Commission and its staff. The various methods and formulae employed from time to time to determine the gross receipts of Appellant subject to assessment in Virginia and the amount of license tax annually to be imposed thereon have not been uniform and admittedly have not met the requirements of §58-547.

Prior to 1942 the gross receipts of Appellant taxable in Virginia were determined by applying to the mileage of lines operated in the state an arbitrary or fixed amount per mile, which was varied from year to year. In 1942 an understanding, which did not purport to meet the requirements of the antecedent of §58-547 but was a substitute therefor, was reached between the State Corporation Commission's staff and the then General Counsel of Appellant which has since served as a basis for the assessment of this license tax. The various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under the following form of protest:

> "This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.
>
> "The business passing through, into or out of this state is interstate business and is not subject to taxation by the state. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $—— reported as 'All receipts earned in Virginia on business passing through, into or out of this state' is computed in accordance with an understanding had

with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

Despite these annual protests, no refunds were sought by Appellant until the United States Supreme Court decided the case of *Spector Motor Service, Inc.*, v. *O'Connor*, 340 U. S. 602 (1951), holding that a state tax *on the privilege of doing solely an interstate business* in a state was unconstitutional, being in violation of the Commerce Clause of the Federal Constitution. Following the Supreme Court's decision in the *Spector* case, Appellant sought refunds for taxes paid pursuant to §58-547 for the years 1950 and 1951 in the amounts of $70,665.68, and $66,454.71, respectively.

The petitions for refund filed with the State Corporation Commission of Virginia raised the single question of the repugnancy of §58-547 to the Commerce Clause of the Constitution of the United States by alleging that §58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several states." [2]

[2] Paragraph 6 of 1950 petition and paragraph 7 of 1951 petition.

The Commission dismissed the petition for refund of the 1950 tax on a jurisdictional point not pertinent to this appeal. With respect to the petition for the 1951 tax refund, the Commission held that §58-547 was a property tax on the going concern value of express companies and not a license or excise tax and was, therefore, not violative of the commerce clause of the Constitution of the United States when applied to Appellant.[3]

Appellant appealed the decision of the Commission with respect to both petitions for refund to the Supreme Court of Appeals of Virginia. This issue as to the invalidity of the tax was raised on appeal in the assignment of errors and statement of questions involved set forth in Appellant's opening brief as required by Rule 5.11 of the Rules of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia in its opinion dated and issued March 9, 1953, held (a) that §58-547 was not repugnant to the Commerce Clause of the Federal Constitution since it imposed a property tax on Appellant's going concern value, and not a tax on the privilege of conducting an express business in interstate commerce.[4] The court's decision was applicable to the petitions for refund for both 1950 and 1951, thereby rendering unnecessary a decision on the jurisdictional question on which the Commission based its adverse decision with respect to the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional issue stated above.

Statute Sustaining Jurisdiction

The judgment of the Virginia Court was entered on March 9, 1953. A petition for appeal is presented herewith,

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[3] The opinion of the Commission is attached hereto as Appendix C; see p. 31.

[4] See page 22 (Appendix A).

to-wit, on May 22nd, 1953. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Section 1257(2) of the Judicial Code and Judiciary (28 U. S. C. 1257(2)) as the decision was rendered by the highest court of the State of Virginia in which a decision could be had and there was drawn in question the validity of a statute of the State of Virginia, § 58-547, on the grounds of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal in this cause: *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69 (1946); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., et al.*, 340 U. S. 179 (1950); *Dean Milk Co.* v. *City of Madison, Wis., et al.*, 340 U. S. 349 (1951); *Niemotko* v. *State of Maryland*, 340 U. S. 268 (1951); *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951); *California State Auto. Ass'n Inter-Insurance Bureau* v. *Maloney, Inc. Comm'r*, 341 U. S. 105 (1951); and *Hughes* v. *Fetter, et al.*, 341 U. S. 609 (1951).

The Question Is Substantial

The federal question presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal is:

The validity under the Commerce Clause of the Constitution of the United States of a state license statute which provides that every express company "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax" measured by a percentage of the gross receipts from operations of such companies within the State *when applied to an express company doing solely an interstate business in such state.*

Invalidity Under Commerce Clause

The United States Supreme Court in *Spector Motor Service, Inc.* v. *O'Connor, supra,* held that a Connecticut income tax assessed against an interstate motor carrier, *doing no intrastate business in Connecticut* "for the privilege of carrying on or doing business within the State," was invalid under the Commerce Clause of the Constitution of the United States because the tax was on "the privilege of engaging in interstate commerce".

The Virginia gross receipts tax on express companies imposed by § 58-547 is by its terms "an annual license tax" assessed "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided". *Appellant is engaged solely in interstate commerce in Virginia.* The Virginia Corporation Commission and the Supreme Court of Appeals so decided.[5] As pointed out above, the intrastate express business is conducted by a wholly-owned subsidiary which is assessed with and pays the license tax imposed by § 58-547 upon its gross receipts.

With the exception that the Virginia tax is imposed on gross receipts while the Connecticut tax is on net income, the situation in the *Spector* case and in the instant case are substantially identical. After the final decision in the *Spector* case, the Virginia Commission and the Supreme Court of Appeals undertook to avoid the consequences of that decision by attributing to § 58-547 the label of a property tax rather than that of a license tax as it had been designated by the General Assembly and treated by the taxing officials for many years.[6]

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[5] See p. 48 (Appendix C), and p. 20 (Appendix A).

[6] An almost identical tax on steamship and other water carriers (§ 58-575 of the Virginia Code, 1950) was likewise considered a privilege or license tax for many years until the recent decision of the Supreme Court of Appeals of Virginia in *Commonwealth* v. *Balto. Steam Packet Co.*, 193

It is manifest from the foregoing that a substantial Federal question is here raised concerning the protection afforded interstate commerce by the Commerce Clause. Unless the error of the Virginia court is promptly corrected, the courts and legislatures of the several states are free fully to evade the ruling of the *Spector* case and place direct burdens on interstate commerce simply by changing the names of existing privileges taxes or giving other names to new privilege taxes. This case sets the pattern unless reversed by the Supreme Court. A question of public importance national in scope affecting the power of state legislatures and courts over interstate commerce is thus presented.

The free flow of commerce across state lines is a vital and indispensable part of the economic life and political existence of our country. The lack of power to keep the channels of interstate commerce open was one of the principal reasons for the adoption of our Constitution. In the *Spector* case, the Supreme Court was only continuing its consistent practice of enforcing the protection afforded to interstate commerce by the Commerce Clause which the Court has done on innumerable occasions down through the years. The following cases are illustrative of the protection thus afforded business that was exclusively *interstate* in character from state taxes upon the privilege of conducting such a business: *Memphis Steam Laundry* v. *Stone*, 348 U. S. 389 (1952) (flat tax per truck, which state court held to be privilege tax, held invalid when assessed against interstate

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Va. 55, 68 S. E. (2d) 137 (1951), reversing the decision of the Corporation Commission holding that such tax was a privilege tax. The Virginia Court held the tax to be a property tax and the Supreme Court dismissed the appeal on April 21, 1952, 343 U. S. 923, presumably on the ground that the taxpayers in that case were involved in intrastate business in Virginia, thus clearly distinguishing the facts from those obtaining in the *Spector* case and in the instant case where no intrastate business was done by the taxpayers.

laundry business); *Spector Motor Service, Inc.* v. *O'Connor, supra* (tax assessed against interstate motor carrier, which state court held to be privilege tax, held invalid when measured by the portion of net income attributable to business within the state); *Joseph* v. *Carter & Weeks Co.*, 330 U. S. 422 (1947) (privilege tax measured by gross receipts held invalid when assessed against interstate stevedoring company); *Freeman* v. *Hewit*, 329 U. S. 249 (1946) (Gross income tax on sale of securities in interstate commerce by resident held invalid); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944) (state sales tax levied on foreign corporation doing exclusively interstate business in state held invalid); *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 (1925) (tax assessed against interstate pipe line company, which state court held to be a privilege tax, held invalid when measured by percentage of capital stock and surplus); and *Alpha Portland Cement* v. *Massachusetts*, 268 U. S. 203 (1925) (tax assessed against foreign corporation which state court held was excise tax, held invalid when measured by percentages of "corporate excess" and net income).

Unless the Virginia Court is correct in labeling §58-547 a property tax it is clearly invalid under these decisions. Where constitutional issues are involved, the Supreme Court is not bound by the label placed upon a state statute by a lower court or a legislative body or by the descriptive words which such a court or legislative body has applied to the statute but decides for itself the character of the tax.

In *Wagner* v. *City of Covington*, 251 U. S. 95 (1919), which went up on a writ of error to the Court of Appeals of Kentucky, a license ordinance was held valid as applicable to peddlers despite prior decisions of the Kentucky Court that the type of activity in question did not constitute peddling. The Supreme Court stated that "The

state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision by inaccurately defining it" (p. 102).

In *Storaasli* v. *Minnesota*, 283 U. S. 59 (1931) on appeal from the Supreme Court of Minnesota, a motor vehicle registration tax claimed to be a property tax, held by state court to be "both a property tax and a privilege tax" was held by the United States Supreme Court to be a privilege tax. The Supreme Court stated that it "decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights" (p. 62).

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), on certiorari to the Supreme Court of Wisconsin, the United States Supreme Court stated "But the descriptive pigeonhole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction" (p. 443).

See also *Lawrence* v. *State Tax Commissioner*, 286 U. S. 276 (1932); *McLeod* v. *Dilworth Co.*, *supra*.

An analysis of §58-547 in the light of the entire scheme of taxation of express companies by the General Assembly of Virginia as set forth in Article 4 of Title 58 of the Virginia Code, 1950,[7] establishes conclusively that the tax imposed by that section is a privilege tax and not a property tax, in view of Section 171 of the Constitution of Virginia which provides that "No State property tax for state purposes shall be levied on real estate or taxable personal property, except the rolling stock of public service corporations. Real estate and taxable personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only."

[7] See Appendix B, p. 28.

The *first* section of Article 4 of Title 58 of the Code (§ 58-546 which is captioned "Taxes on *property* of Express Companies"), provides that every express company shall "pay to the *State* and to the several *counties, cities and towns,* of the State, wherein they may have taxable properties located, the taxes levied on such *property* as follows:". The statute then lists the rates of the taxes payable to the *State* on "*intangible* personal property" and "*money*" and, following the mandate of the Constitution, provides for local levies on "real estate and tangible personal property" of express companies. Thus in the *first* section of Article 4, the General Assembly has provided a comprehensive plan for the taxation of all types of *property* which express companies normally employ in the operation of their business, i.e., money, *intangible personal property,* real estate, and tangible personal property.

The *second* section of Article 4 is § 58-547, which as indicated above, is captioned "Annual license tax." Its opening provision is as follows:

> "Every such company, for the privilege of doing business in this State, *in addition to the annual registration fee and the property tax* as herein provided, shall pay *an annual license tax* as follows:" (Italics supplied.)

Then follows the rate of tax and a formula for apportioning gross receipts when interstate business in involved. It is significant that the tax imposed by the *second* section of the Article is in *addition* to "the property tax" imposed by the *first* section, which specifically includes the state tax on "intangible personal property."

The remaining provisions of the Article are largely administrative in nature and not pertinent here with the exception of the *eighth* section (§ 58-553), which provides that "the amount of *taxes* and *licenses* imposed by this article

and authorized to be imposed shall be *in lieu* of all other *taxes* and *licenses*, State, county and municipal, upon all the *property*, franchises and privileges of such companies", except motor vehicle licenses and fuel taxes.

It is manifest that it was the intention of the General Assembly in enacting and re-enacting this statute since 1915, to levy a *property* tax on the money, on the tangible *and intangible personal property* and on the real estate of express companies and, in addition, *to tax by means of an excise tax the privilege of doing business in this State.* Indeed, the privilege tax imposed by § 58-547 is expressly made "in *addition* to the annual registration fee and the *property tax*" provided for in the same article. If this excise tax is "in addition" to the property tax imposed by § 58-546 and, together with such property taxes and the annual registration fee are "in lieu of all other taxes and licenses", a decision that it is a form of *property* tax rather than a *license* tax imposed *for the privilege of using that property in the conduct of an express business in Virginia is clearly arbitrary and in direct conflict with the obvious intention of the General Assembly.*

The tax imposed by § 58-547 is also not a property tax for the even more significant reason that the *property* of express companies is not the *subject* of the tax. Under other specific provisions of Article 4 express companies pay a separate local tax on their real estate and on their *tangible* personal property and a *separate* tax to the State on their money and on their *intangible personal property.* The tax imposed by § 58-547 is measured by the *gross* receipts of express companies derived from intrastate business done in Virginia and interstate business apportioned to Virginia. *The tax is thus made proportionate to the extent that the privilege of carrying on an express business in Virginia is exercised and is not related to the value (net profits) pro-*

duced by the exercise of that privilege. The tax is on the privilege itself and nothing else. This is true for the reason that the tax must be paid regardless of whether the operations of an express company produce *value* by operating at a profit, or produce no value by operating at a loss. If this were a tax on the value produced by the exercise of the privilege, as the Commission and the Virginia Court decided, it would have to be levied on the *net* profits and not on the *gross* receipts because it is only the earnings after expenses and other charges and not gross receipts, *that is the measure of the value of the property derived from the exercise of the privilege.*

The Supreme Court in *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), discussed this significant difference as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (pp. 328-329)

There are numerous cases from other states in which taxes on *gross* receipts and similar taxes on express companies and carriers of persons and property have been held to be *privilege* taxes, rather than *property* taxes.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280

U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 345. Galveston, H. & S. A. R. Co. *v.* Texas, supra, 227. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298. U. S. Express Co. *v.* Minnesota, 223 U. S. 335. Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 295, 297. Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321, 329. Pullman Co. *v.* Richardson, supra." (p. 349)

Of especial significance is *American Barge Line Co.* v. *Koontz*, 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that state held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases*, 232 U. S. 576 (1914), the Supreme

Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

Thus the authorities fully support the position that the tax imposed by §58-547 is a *privilege* tax and not a *property* tax.

Further evidence of the intention of the General Assembly of Virginia that §58-547 is a tax on the privilege of doing business in Virginia is the subsequent legislative history of the license tax imposed by §58-575 on the gross receipts of steamships and other water carriers considered in *Commonwealth* v. *Balto. Steam Packet Company, supra.*

The *Baltimore Steam Packet Company* case was decided December 3, 1951. The General Assembly met in January, 1952, and immediately amended §58-575 of the Code, relating to license taxes upon steamship and other water carriers, by providing that such taxes should be measured *only* by their gross receipts derived from *intrastate* commerce (Acts 1952, Chap. 486, page 779). There is nothing whatever in this enactment indicating a legislative purpose to impose a *property* tax determined by a certain percentage of the gross receipts of such companies. On the contrary, the legislature again re-enacted the tax as "an annual license tax" and declared it to be "in *addition* to the annual registration fee and *property* tax" imposed upon such companies by the preceding sections (§58-570 to §58-574 of Article 7, Chap. 12) of the Code. The foregoing action of the legislature would alone justify this Honorable Court in restoring to the gross receipts tax imposed upon such companies the meaning traditionally accorded

to the language of §58-575, and thus decide that that language correctly describes the incidence of the tax as a *license* and not a *property* tax upon such companies.

The 1952 amendment of §58-575 is also highly significant in the light of the history of the administration by the State Corporation Commission of the tax imposed by that section upon steamship companies. Such a tax was first enacted in 1915 but the Commission had never taxed water carriers on gross receipts derived from *interstate* business until 1949 because of an opinion of the Attorney General of the Commonwealth, given shortly after the statute was enacted, *that to do so would be unconstitutional.*[8] Thus the *license* tax on this class of companies (§58-575) was re-enacted by the General Assembly from time to time since 1915 *with full knowledge that it was the practice of the Commission not to impose the tax on the gross receipts of such companies derived from interstate business.* Then, immediately after the tax was first assessed in 1949 upon gross receipts derived from interstate commerce and immediately after the Supreme Court of Appeals of Virginia held that the tax as so applied was constitutional, the General Assembly let the Court and the Commission know *that it was its intention that the tax should not be imposed upon gross receipts derived from interstate commerce in Virginia.* If it had been intended by the legislature that the tax was upon the *property* of the companies affected, there would have been no occasion for such a change in the law.

Appellant respectfully submits, therefore, that the action of the General Assembly in amending § 58-575 subsequent to the decision by the Virginia Court in the *Baltimore Steam Packet Company* case definitely establishes the legislative intent as to the nature of that tax as a *privilege*

[8] See Opinion of Supreme Court of Appeals of Virginia in *Commonwealth* v. *Balto. Steam Packet Co., supra.*

rather than a *property* tax. If there was any intention on the part of the General Assembly that such a tax be a property tax, there could be no basis in reason for distinguishing between such "property" as might be derived from intrastate commerce and that produced by interstate commerce.

It is respectfully submitted that (a) a review of the entire scheme of taxation of express companies in Virginia, (b) the clear language of §58-547, (c) the interpretation given this and similar statutes for many years by the state taxing officials, (d) the recent action of the Virginia General Assembly with respect to the similar gross receipts tax on steamship and other water carriers, and (e) the decisions of courts in many other jurisdictions construing similar statutes, all fully support the position that §58-547 is a *privilege* tax and not a property tax.

The decision of the Virginia Court has failed to recognize the limitations placed by the Commerce Clause on the power of states to tax interstate commerce and has permitted a direct burden on interstate commerce by misdescribing §58-547 as a property tax. There is no question as to Appellant being engaged solely and exclusively in interstate commerce in Virginia and we believe that the question presented by the appeal is substantial and of considerable public importance, fully justifying a review by the Supreme Court.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

RAILWAY EXPRESS AGENCY, INC.,

v.

COMMONWEALTH OF VIRGINIA

Opinion by Justice Lemuel Franklin Smith, Richmond, Va. March 9, 1953.

Appeal from an Order of the State Corporation Commission

The appellant, Railway Express Agency, Incorporated, filed two applications with the State Corporation Commission seeking the correction of assessments of State taxes made against it by the Commission and the refund of taxes paid for 1950 of $70,665.68 and for 1951 of $66,454.71, which taxes were measured by gross receipts from business done in Virginia under the provisions of Code, §58-547.[9] The applications were made on the ground that the assessments were invalid, because they constituted a burden on inter-

[9] "§ 58-547. Annual license tax.—Every such company, [express company] for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)"

state commerce in violation of the Commerce Clause of the Federal Constitution, art. 1, §8, cl. 3.

The appellant contends that §58-547 imposes a license tax upon the privilege of carrying on a business exclusively interstate in character and, therefore, is violative of the Federal Constitution; that the apportionment formula provided in §58-547 is invalid; and that, if the tax assessed under §58-547 is a property tax, the appellant has no going concern value on which such a tax could lawfully be levied.

Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931, following the affirmance by this court [10] of an order of the State Corporation Commission which denied the appellant the authority to do an intrastate express business in this State.

The application for correction of assessment and refund of taxes paid for the year 1950 was dismissed by the Commission, because it was not filed within the time prescribed by Code, §58-672, the Commission therefore being without jurisdiction to grant the relief requested. The appellant contended before the Commission, as it does here, that Code, §58-1122 provides an alternative procedure under the terms of which its application was filed within the time provided.

It is not, however, necessary for us to decide whether the petition was timely filed; for even if we assume that the appellant has proceeded correctly under a proper statute, it is not entitled to the relief sought for the reasons hereinafter stated.

The Commission also denied the relief sought in the case of the 1951 assessment, holding that its decision was gov-

[10] *Ry. Ex. Agy.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed., 450.

erned by *Commonwealth* v. *Balto. Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137, *app'l dismissed*, 343 U. S. 923, 72 S. Ct. 763, 72 S. Ct. 764, 96 L. ed. 1335.

The *Balto. Steam Packet* case arose out of appeals by the Commonwealth of Virginia from two adverse decisions of the State Corporation Commission which held invalid the State taxes assessed under the provisions of Code, §58-575 against two steamship companies, which taxes were measured by gross receipts from interstate business done in Virginia. The steamship companies were engaged in both interstate and intrastate commerce, although their intrastate commerce produced only a small fraction of their total revenue. The principal issue in the case centered on the taxpayers' contention that the taxes assessed on receipts from interstate commerce apportioned to business done in this State was a violation of the Commerce Clause. The steamship companies argued that the tax was an annual license tax levied on their gross receipts for the privilege of doing an interstate business in this State and they pointed to the language of §58-575 which did, at that time, denominate the tax an annual license "for the privilege of doing business in this State."

After discussing the pertinent decisions of the Supreme Court of the United States dealing with the very controversial subject of State taxation as a burden on interstate commerce, we decided in the *Balto. Steam Packet* case that if a tax "is in substance and effect a fairly apportioned tax on property, it is valid." In answer to the question then presented—What kind of tax is levied by §58-575?—we pointed out in the course of our opinion that it is the operation of the statute and not its descriptive label that governs the character of a tax and concluded that §58-575 provides for a property tax, not a license tax for the privilege of doing business, in these words: "In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed." 193 Va. at p. 70. This holding was based on analysis of the numerous decisions of the Supreme Court of the United States discussed in the opinion which recog-

nize the principle that the going concern value of a business is taxable although the individual physical properties from which it arises are used in interstate commerce.

The appellant filed a brief as *amicus curiae* in the *Balto. Steam Packet* case wherein it vigorously upheld the contention of the taxpayers that the tax levied under §58-575 was invalid. At the oral argument of the case at bar it conceded that this case is on all fours with the case involving the water carriers except that the appellant here does no intrastate business.

In *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 71 St. Ct. 508, 95 L. ed. 573, the rule is laid down that a State tax upon the privilege of carrying on a business exclusively interstate in character violates the Commerce Clause no matter how fairly it is apportioned to business done within the State.

[1] However, the tax levied under the provisions of Code, §58-547 is not a tax upon the privilege of carrying on a business exclusively interstate in character. Like the tax imposed by Code, §58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer arising out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031; *Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654.

[2] The appellant argues that the action of the General Assembly in amending §58-575 (applicable to steamship and other water carriers) the month following the decision of this court in the *Balto. Steam Packet* case definitely established the legislative intent to impose that tax as a privilege rather than as a property tax. See Acts of 1952, ch. 486, p. 780. The amendment of §58-575 deleted the words

"for the privilege of doing business in this State," and then went on to make the tax applicable only to gross receipts derived from intrastate business. We do not see any indication in this amendment of a legislative intent to change the nature of the tax as defined by this court immediately prior to the amendment. For reasons sufficient unto itself, perhaps to encourage the development of the harbors and waterways of Virginia or because for many years the tax on interstate receipts had not been enforced, the legislature changed the law as it applied to steamship and other water carriers, but made no changes in the almost identical statute which applies to express companies. And this was done notwithstanding the fact that the legislature had before it the decision in the *Balto. Steam Packet* case which stated in the following language that the rule of the case as regards steamship and other water carriers would also apply to express companies:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is" 193 Va. at p. 68.

Furthermore, says the appellant, if the gross receipts taxes imposed by § 58-547 (express companies) and § 58-575 (steamship and other water carriers) are in fact property taxes, then § 58-575, as amended in 1952, fails to tax the going concern value which is produced by the interstate business of steamship and other water carriers and consequently is in conflict with § 168 of the Constitution of Virginia which provides that "All property, except as hereinafter provided, shall be taxed"; there being no subsequent provision of the Constitution exempting the property of steamship and other carriers. If, on the other hand, continues the appellant, these taxes are privilege taxes, the 1952 amendment of § 58-575 results in no unlawful attempt to exempt property from taxation.

Of course, we do not have before us the question whether § 58-575 violates § 168 of the Constitution, but merely the

argument that if § 58-547, and § 58-575, as amended, impose property taxes, the latter is in conflict with § 168 of the Constitution. When we are confronted with the question of the constitutionality of the 1952 amendment of § 58-575 we will deal with it.

[3] Continuing its argument as to the nature of the tax imposed by § 58-547, the appellant contends that if the taxes levied by the State on the gross receipts of public service corporations are property taxes on the going concern value of such taxpayers rather than privilege taxes, then such taxes are violative of § 171 of the Constitution of Virginia to the extent that they are levied on the going concern value produced by or derived from the physical properties of such corporations, since property of this class and kind is specifically segregated to the localities for taxing purposes. However, as heretofore stated, the *Balto. Steam Packet* case held specifically that the tax involved was a State tax on *intangible* property which is measuerd by the gross receipts derived from the use of the physical properties which are taxed by the localities. Intangible property is not segregated to the localities, but is a proper subject of State taxation.

[4] The appellant also asserts the invalidity of the tax on the ground that the apportionment formula provided in § 58-547 is an improper fraction, its numerator being larger than its denominator, with the result that if the formula were applied as written, the State would subject to the tax more than 100% of the total gross receipts of the appellant, regardless of where earned. And it was mandatory, continues the appellant, to use the formula in computing the tax, because nowhere in the record are the gross receipts from business done in Virginia clearly shown.

The identical type of fraction was contained in § 58-575, prior to the 1952 amendment, and the same argument was used in the *Balto. Steam Packet* case. Neither in that case nor the one now before us was the formula used in computing the tax complained of. The 1950 tax herein involved was paid under a form of protest which included this sentence: "The $3,286,775.70 reported as 'All Receipts earned in Virginia on business passing through, into or out of this

State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measuerd by such receipts." A similar provision was included in the protest filed with the payment of the 1951 tax. The opinion of the Commission states that it has acquiesced in the view that because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the taxpayer to employ the formula based on mileage. The opinion further states that "The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low." The appellant states in the aforesaid form of protest that it has no way of ascertaining how much of its receipts is applicable to business passing through, into or out of this State. Section 58-547 provides that if the actual receipts from business done in Virginia are not clearly shown, the amount applicable to the tax shall be computed according to the formula. The formula was not used in this case because, in the opinion of the Commission, it would have been inequitable to apply it. Instead a method was used which the appellant prefers to call an "understanding" between it and the Commission which resulted in a tax admittedly lower than it would have been had the formula been used. In fact, the Commission asserts that the tax assessed is less than it would have been even if the appellant had been able to compute its gross receipts resulting from business done in this State. It is not necessary in this case to resort to the formula to compute the tax. Mr. Justice Buchanan in the *Balto. Steam Packet* case called attention to the improper fraction, its numerator being greater than its denominator and said, "That, of course, was not intended." Section 58-575 there referred to has since been amended as pointed out before. The attention of the General Assembly is again called to this matter.

[5] As its final argument the appellant contends that

if the tax is a property tax rather than a license tax appellant's property has no going concern value in the generally accepted sense of that term, hence there is no intangible value on which the tax herein complained of can lawfully be levied. In short, if this is a property tax, appellant has no property of the type subject to it.

All of the appellant's capital stock is owned by sixty-eight railroad companies and it follows that the policies of the appellant, including the fixing of rates, are determined by the stockholding railroad companies, subject of course to governmental regulation.

The appellant's going concern value, or lack of it, was not an issue before the State Corporation Commission. The question was not raised in the appellant's applications, nor was it mentioned at the hearing before the Commission or in the appellant's memorandum submitted for the Commission's consideration. Naturally, it was not discussed in the Commission's opinion and the question has at no time been considered by the Commission. However, Commissioner Catterall said in the opinion of the Commission while discussing intangible property values: "An express company with a nation-wide monopoly enjoys valuable good will. The going concern value if its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) * * *." Thus, that judicial tribunal on the facts before it held that the express company had a going concern value.

Finally, as we have said before, the steamship companies in the *Balto. Steam Packet* case contended that Code, § 58-575 was invalid because it violated the Commerce Clause. No question was raised in that case about the tax on business beginning and ending in this State. The companies paid the tax on their intrastate business without question. The challenge was directed to the tax on all receipts earned in this State on business passing through, into or out of this State. Thus, the only gross receipts con-

sidered were those derived from interstate commerce. In the instant case the only business taxed under § 58-547 was interstate business, for the appellant had no intrastate business. The issue, therefore, presented in the case of the steamships and the case at bar, is the same and arose under statutes almost identical in language and operation.

Under the decision of the *Balto. Steam Packet* case, it is clear that the provisions of § 58-547 impose a valid property tax on the appellant measured by the gross receipts earned on business done in Virginia.

It follows from what has been said that the orders of the Commission appealed from are affirmed.

Affirmed.

APPENDIX "B"

Article 4 of Title 58 of The Code of Virginia, 1950

§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the

proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1991, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924).

§ 58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:

(1) All of its real and personal property of every description in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are party within and party without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, § 218.)

§ 58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer of each such company. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the

purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-554. Penalty for failure to pay.— Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-555. Penalty for failure to report.—Any such company failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

APPENDIX "C"

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

Application of RAILWAY EXPRESS AGENCY, INCORPORATED

For refund of license taxes.

Cases Nos. 10,629 and 10,767

Opinion, CATTERALL, *Commissioner:*

Railway Express Agency, Incorporated is a Delaware corporation, and Railway Express Agency, Incorporated, of Virginia, is a Virginia corporation. The Delaware corporation owns the stock of the Virginia corporation and since March 12, 1932, the Virginia corporation has carried on the intrastate express business in Virginia.

Since the creation of the Virginia company, both companies have paid the annual license tax imposed by § 58-547 of the Code, but the Delaware company has taken the position that the tax on it violates the commerce clause of the federal constitution. In 1930 (before the creation of the Virginia company) it raised this question in a petition to the State Corporation Commission. The Commission held the tax constitutional but reduced the amount of the tax measured by gross receipts from interstate business by about $41,000. Annual Report 1933, p. 9. The company did not appeal from that order, but for many years it has paid its taxes under protest, and, when the Supreme Court of the United States on March 26, 1951, rendered its decision in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, the company was encouraged to try again to upset the tax.

By that time, more than three months had elapsed since it had received the certified copy of the assessment for 1950, and it was too late to apply for a refund under § 58-672. It applied under § 58-1122. The petition in the second case (for 1951) was filed within the three months' period.

In Case No. 10,629 we have to decide whether we have jurisdiction to entertain the petition, or whether the petition was filed too late. On the constitutional question, the issues in both cases are, of course, the same; and both cases were heard together.

The question of jurisdiction in Case No. 10,629.

We have come to the conclusion that the petition in Case No. 10,629 was filed too late and that the Commission has no jurisdiction to pass on it.

Title 58 of the Code covers the subject of taxation and Chapter 12 of that title deals with the taxation of public service corporations, although the chapter includes some taxpayers that are not corporations and some corporations that are not public service companies.

Article 4 of that Chapter imposes the taxes on express companies and Article 16 covers the subject of erroneous assessments. All references in this opinion to "articles" will refer to articles in Chapter 12 of Title 58.

Article 16, in § 58-672, provides for relief from erroneous assessments on "any transportation company, transmission company or other public service corporation."

As used in the constitution and laws of Virginia, "transportation company" is a word of art that does not have its ordinary dictionary meaning. For example, a common carrier by motor vehicle is not a transportation company. An express company is a transportation company.

Sec. 153 of the constitution says:

> ". . . the term 'transportation company' shall include any . . . express company . . ."

Therefore, the petitioner is included in Article 16 as specifically as if Article 16 used the words "express company;" and Article 16 is a specific law under which express companies may apply for relief from erroneous assessments made by the State Corporation Commission.

Section 58-1122, on which petitioner relies, is a general statute for the correction of taxes assessed by the State Corporation Commission, and it allows a petition to be filed

at any time within one year *after* the tax complained of has been *paid*. The words to be construed are:

> ". . . unless and except as otherwise specifically provided . . ."

Section 58-1122 provides a catchall for cases not otherwise specifically provided for. It gives rights of review to individuals as well as corporations and to corporations that are not public service corporations. Our interpretation of the legislative intent is that a petition that can be filed under Article 16 cannot be filed under § 58-1122. So far as we know, the question now raised by petitioner has never been raised before. In the past, all petitions that could be filed under Article 16 were filed under that article.

The petition filed by petitioner in Case No. 4037, reported in our 1933 Annual Report at page 9, was filed under Section 235 of the Tax Code (Acts of 1928, p. 164), which is the source of Article 16. Proceeding under that section, petitioner got a refund of over $40,000, and yet the burden of petitioner's argument seems to be that that section does not relate to refund claims. At page 11 of its brief, petitioner says:

> "But there are not any other specific statutory provisions *relating to the refund of license taxes paid by express companies.*"

At page 12 of its brief, petitioner says:

> "Section 58-672 . . . does not specifically provide for *a claim for refund* of taxes *already paid.*"

Section 58-672 does not use the word "refund." It uses the words "review and correction." The only way to correct an assessment that has been paid is to refund the money, and Article 16, in § 58-675, expressly provides for the refund of taxes already paid. It says:

> ". . . appropriate relief shall be granted, including the right to recover from the State or local authorities, or both, as the case may be, any excess of taxes that

may have been paid. The order of the Commission shall be enforced by mandamus, or other proper process, issuing from the Commission."

The writ of mandamus is a common law writ to compel a public officer to perform a ministerial duty. It does not issue to compel a private corporation to pay a tax, but does issue to compel a public officer or municipal corporation to refund a tax. Article 16 is a specific statute providing a complete remedy at law pursuant to which express companies can apply for and get refunds.

Petitioner argues that this remedy is not specifically provided for express companies because Article 16 does not contain the words "express companies." And it points to § 58-540 in Article 2 which mentions railway and canal companies and to § 58-616 in Article 10 which mentions water or heat, light and power companies.

Section 58-540, relating specifically to railways and canals, and § 58-616, relating specifically to water or heat, light and power companies, relate solely to relief in the Circuit Court of the City of Richmond. Neither section provides for relief on application to the State Corporation Commission, and both are unconstitutional. § 58-540 conflicts with Sec. 180 of the Constitution which provides that a railway or canal company "may, according to such course of procedure as may be prescribed by law, apply for relief first to the State Corporation Commission and *then* to the Circuit Court of the City of Richmond." § 58-616 conflicts with Sec. 156(d) of the Constitution which forbids any circuit court to "review, reverse, correct or annul any action of the Commission, within the scope of its authority."

Article 16 covers "any transportation company, transmission company or other public service corporation." Therefore railway and canal companies, and water or heat, light and power companies can seek relief under Article 16. § 58-676 (in Article 16) provides that all of them, *after review by the Commission*, can go to the Circuit Court of the City of Richmond. That provision appears to be unconstitutional as to all except railway and canal companies (Const. Sec. 180). § 58-677 (in Article 16) provides that all

parties may go to the Circuit Court of the City of Richmond "for relief from any original assessment without having first applied to the Commission for a review thereof." That section appears to be inconsistent with Sec. 156(d) of the Constitution.

Accordingly, railway, canal, water, heat, light, power and express companies are all specifically provided for in Article 16. All may petition under Article 16 and all must petition under Article 16. The argument based on the fact that express companies are not mentioned by name in Article 16 applies equally to all the others, because none of them is there specifically mentioned by name. A statute that applies specifically to all transportation companies applies specifically to every transportation company. In legislating for a class, the legislature does not have to name every member of the class in order to make the law apply specifically to every member of the class. The class to which Article 16 applies consists of public service companies whose real estate and tangible property are assessed by the Commission, who state franchise or license taxes are assessed by the Commission, and to whom the Clerk of the Commission is required by law to forward a certified copy of the assessment. The three months begins to run "after receiving a certified copy of such assessment of value or tax." The taxpayer has actual notice of the assessment before time begins to run against him.

Such taxes are assessed by the Commission after giving the taxpayer thirty days' notice that the assessment is to be made. See the following sections:

Railway and canal	§ 58-529
Express companies	§ 58-549
Freight car companies	§ 58-558
Sleeping cars	§ 58-566
Steamship lines	§ 58-582
Pipe lines	§ 58-590
Water, heat, light and power	§ 58-610
City bus lines	§ 58-647

The notice specifies the date when a hearing will be held on the assessments in the courtroom of the Commission.

Each taxpayer is given an opportunity to be heard. After the hearing the taxes are assessed by order of the Commission and copies of the assessments are printed and sent to the State Comptroller and to every city, town and county, and to each taxpayer. The sections of the Code relating to the certification of these assessments by the Clerk of the Commission are:

	To Comptroller and taxpayer	To cities, towns and counties
Railroads	§ 58-530	§ 58-538
Express companies	§ 58-550	§ 58-551
Freight cars	§ 58-559	None
Sleeping cars	§ 58-567	None
Steamships	§ 58-572	§ 58-573
Tel. & tel.	§ 58-583	§ 58-584
Pipe lines	§ 58-590	§ 58-592
Water, etc.	§ 58-611	§ 58-612
City bus	§ 58-648	§ 58-650

Taxpayers falling in this class are thus notified in advance of the assessment that is about to be made, and each taxpayer receives an invitation to state his objections to the assessment before it is made. After the assessments have been made and printed, copies are certified to all the interested parties. Article 16 then gives each taxpayer three months in which to file a petition for a review and correction of any item that he takes exception to. Article 16 provides the specific method for review and correction of the taxes thus assessed.

Petitioner bases two arguments on the wording of § 58-1122 on the mistaken assumptions (1) that the Commission assesses license taxes only against public service companies, and (2) that if the *res judicata* clause in § 58-1122 does not apply to proceedings under § 58-672, there is nothing else for it to apply to.

1. The first of these arguments is stated on page 10 of petitioner's brief:

> "The General Assembly must have intended for at least some corporations to have a right to claim a refund of license taxes under Section 58-1122; otherwise that part of the statute would be meaningless and

presumably would not have been adopted by the General Assembly. Since the Commission assesses those taxes only against public service corporations it is apparent that the relief granted to such corporations by Section 58-672 cannot be exclusive."

The Commission assesses many taxes besides public service company taxes. Some of these taxes are called license taxes and are license taxes; other are not called license taxes and are license taxes.

For example, the taxes imposed by Articles 12 and 13 are called "road taxes" and are license taxes. If a motor carrier fails to pay these taxes, we revoke his privilege to use the highways.

The taxes imposed on insurance companies by § 58-486 are called license taxes and are license taxes. They are assessed by the Commission under § 58-497. If they are not paid, the Commission revokes the taxpayer's license to do business (§ 58-498).

These are examples of taxpayers who can claim refunds under § 58-1122.

The so-called "license" taxes imposed on express companies are the same kind of taxes as the "franchise" taxes imposed on railroads. Neither of them is a license tax, because neither is exacted as a condition of carrying on the business. A license tax is an excise tax that must be paid as a condition of carrying on a business or exercising a privilege.

2. The second of these arguments is stated on page 12 of petitioner's brief:

> "Section 58-1122 provides that a refund of tax cannot be obtained 'after a formal adjudication in a proceeding in which the right of appeal existed and was not taken.' She quoted language must refer to a proceeding that could be brought under a section other than Section 58-1122 in which the decision was against the taxpayer; . . ."

The quoted language is merely a statement of the doctrine of *res judicata*. Many taxes assessed by the Commission are certified to the Comptroller for collection. If such a tax

is not paid, the Comptroller causes suit to be brought against the delinquent taxpayer. If the decision in that suit is against the taxpayer, he obviously cannot pay the tax and thereafter apply for a refund. The same principle applies to cases in which the Commission imposes penalties on taxpayers under §§ 58-635 and 58-642. If the penalty is imposed for failure to pay taxes, it would be a bar to an application for a refund of the same taxes. All decisions of the State Corporation Commission can be appealed.

Case No. 10,629 must be dismissed because the petition was not filed in time. We turn now to the constitutional question that is properly raised in Case No. 10,767.

The Constitutional Question

This case is governed by *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, appeal dismissed, 96 L. Ed. Adv. Ops. 578 (April 21, 1952).

Article 7, taxing steamship companies, and Article 4, taxing express companies, are so much alike that no distinction can be drawn between them. Petitioner, realizing that the decision of that case would control this case, filed a brief *amicus curiae* in that case. In that brief, petitioner said (p. 2):

> "In view of the importance of the Court's ruling, both to the Appellees and to many other corporations operating in Virginia either entirely or partly in interstate commerce, Railway Express thought it in the public interest that this Court should have before it a full presentation of its viewpoint on the problems involved."

The Supreme Court of Appeals, at page 68 of its opinion said:

> "In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is."

Except for poll taxes, all taxes are either excise taxes or property taxes. The reason it is necessary to decide whether a particular tax is an excise tax or a property tax is because of constitutional limitations. The constitution of the United States, for example, provides, in effect, that all federal taxes on property must be apportioned among the several states in accordance with their respective populations, and that all federal excise taxes must not be so apportioned, but must be uniformly applied throughout the United States. Accordingly, the constitutionality of every federal tax depends on whether it is an excise tax or a property tax. Beginning with *Hylton* v. *United States*, 1 L. Ed. 556 in 1796, nearly every federal tax has been contested in the Supreme Court on the ground that it was not properly apportioned or was not properly uniform. In the great case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 759 (1895) the court held, five to four, that a general income tax was a property tax as to income from property and an excise tax as to income from earnings. That decision was reversed in 1913 by the 16th Amendment, and has never commanded universal respect. The Court of Appeals of Virginia refused to follow it in 1936 in *Hunton* v. *Commonwealth*, 166 Va. 229.

Beginning with decisions rendered by Chief Justice Marshall the Supreme Court has held that the commerce clause, which says that Congress shall have power to regulate interstate commerce, means that the states are forbidden to regulate interstate commerce. Since those decisions are based more on considerations of policy than of logic, they cannot be carried to a strictly logical conclusion; and ever since *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), it has been recognized that the states are free to regulate some parts of interstate commerce, namely those parts that the Supreme Court thinks it desirable that the states should be free to regulate. Proceeding from the field of regulation to the field of taxation, the Supreme Court has decided that a state tax on interstate commerce is a state regulation of interstate commerce and is void if it goes too far. It is interesting to look at the actual words of the constitution and then contemplate the edifice the court has built on them.

Those words are:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

With only those words to guide it the court has struck down countless state taxes on the ground that they impede the free flow of commerce more than they should, and has upheld countless state taxes on the principle that "interstate commerce must pay its way."

In this field of constitutional law the court itself, without any words in the constitution expressing or implying any such distinction, has drawn a line between excise taxes and property taxes. If the tax is an *excise* tax, the court may or may not strike it down, but if the tax is a *property* tax all is well: state taxes on property *used* in interstate commerce are upheld so long as the property is located in the taxing state. State property taxes that get by the due process clause do not run into trouble with the commerce clause.

So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, the court said (p. 70):

> "Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:
>
> " 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'
>
> "It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the

bare bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause."

Commenting on this decision, the April, 1952, Virginia Law Review at page 423 remarks:

"It appears that the Court in the instant case preferred to sustain the tax on the ground that it was an *ad valorem* tax rather than on the ground that it was a privilege tax on a business not exclusively interstate in character. If the mental gymnastics employed by the Court are questioned, it may only be answered that this is not the first time such an approach to the problem has been used. If the Spector case is an indication of a return to the 'direct-indirect' test as to state taxation of interstate commerce, then the Court was wise in its choice of grounds."

We deprecate this suggestion that our highest court engaged in "mental gymnastics" to get around the *Spector* case. Long before the *Spector* case was heard of the franchise or license taxes on public service companies were regarded as property taxes.

Sec. 170 of the constitution provides:

"The General Assembly . . . may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other property*, in whole or in part, of a transportation, industrial or commercial corporation."

If the framers of the constitution had not regarded franchise taxes as taxes on *property*, they could not have used the words "*other* property."

(§ 58-553 makes the express company tax in lieu of other taxes. By virtue of that section express companies escape the tax on their rolling stock).

The franchise or license taxes imposed on public service companies are taxes on *intangible* property.

In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55 at page 69 the court said:

> "We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:
>
> " 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible" value of the company.' "

An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. ed. 965 (1897) as follows:

> "But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal

Constitution which restrains a state from taxing at its real value such intangible property."

* * * * * * *

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

* * * * * * *

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

At the 1952 session of the General Assembly, Article 7, imposing taxes on steamship carriers, was rewritten; and

petitioner argues that the amendment amounts to a legislative declaration that the Supreme Court of Appeals had misinterpreted the intent of the legislature. At page 27 of its brief petitioner says:

> "Applicant is of course aware of the decision of the Supreme Court of Appeals in the *Baltimore Steam Packet Company* case, supra, that a quite similar tax on steamship and other water carriers was not a privilege tax but a property tax on the going concern value of such companies. This Honorable Commission would undoubtedly be bound by that decision in applying the statute to any other *steamship* company except, for the action of the General Assembly at its 1952 Session in amending the gross receipts tax on such companies (Sec. 58-575 of the Code of Virginia) so as to provide that such tax should apply *only* to gross receipts derived from *intrastate* commerce in Virginia. The effect of this amendment is to nullify at the earliest opportunity the decision of the Court of Appeals in the *Baltimore Steam Packet Company* case and clearly establishes the legislative *intent* that the tax there involved was never intended to apply to gross receipts earned from *interstate* commerce. Applicant therefore respectfully submits that the action of the General Assembly in amending Section 58-575 of the Code of Virginia (subsequent to and in the light of the opinion of the Supreme Court of Appeals in the *Baltimore Steam Packet* case) definitely establishes the *nature* of that tax to be a *privilege* tax, rather than a property tax. *The tax on express companies under consideration here is so similar as to be subject to the same interpretation.*"

This argument about legislative "intent," when broken down into its component parts, asserts three things:

1. The legislature wanted to "nullify" the court's decision. The word "nullify" is used to create the impression that the legislature was trying to wipe the decision off the books retroactively.

2. The tax was "never intended to apply to gross re-

ceipts from *interstate* commerce." This is saying that the legislature amended the law for the purpose of changing its meaning retroactively. The argument asserts that although the statute expressly covered interstate commerce, the legislature never intended it to cover interstate commerce.

3. The legislature, having learned that the tax is constitutional because it is a property tax, quickly amended the law for the purpose of expressing its desire that the Court of Appeals hold unconstitutional the tax on express companies.

Of course, in seeking the "intent of the legislature," we are not looking for what was in the back of the minds of the legislators. The intent of the legislature must be found in the words used by the legislature, and the object of interpretation is to discover the *meaning* of those words.

The words in question are:

> ". . . all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State . . ."

Petitioner asks us to hold that the General Assembly, by amending the statute in 1952, intended to say that its words "business passing through, into or out of this State" were never intended to describe anything but intrastate movement. Such an interpretation is impossible.

Petitioner asks us to hold that the 1952 amendment was intended to be retroactive and to "nullify" the decision of the Court of Appeals. If the decision were really nullified, it could not be enforced, and the steamship companies would not have to pay the 1950 and 1951 taxes. But the new statute (Chapter 486, Acts of 1952) concludes:

> "These sections as amended shall go into effect as of the beginning of the first day of January, nineteen hundred fifty-three."

Not only has the legislature not nullified the 1950 and 1951 assessments: it has declared that the taxes shall be assessed for 1952, and has thereby expressed its agreement

with the court that the tax measured by interstate earnings is valid.

This amendment was not adopted for the purpose of expressing disapproval of the court's interpretation of the law but for the purpose of encouraging navigation in the great port of Hampton Roads. That was a subject prominently before the 1952 General Assembly. The legislature toured Hampton Roads in a body and passed a law (Chap. 61, Acts of 1952) to create the "Virginia State Ports Authority" to encourage the development of the ports. As one means of promoting that public policy, the legislature reduced the taxes on steamship lines beginning with the year 1953. Since the Court of Appeals had just held that the license tax imposed by § 58-575 was not a privilege tax, the General Assembly, when it amended § 58-575, left out the word "privilege" for the purpose of making it clear that it agreed with the holding of the court that these taxes are not in fact privilege taxes. Petitioner's argument that we should now hold that the legislature was trying to make unconstitutional the franchise and license taxes on which so large a part of the state's revenue depends is as topsy-turvy as the upside-down fraction in the apportionment formula.

Unquestionably, the fraction described in § 58-575 for steamship lines and in § 58-547 for express companies is upside down. Many people find it confusing to describe ratios and this mistake is not uncommon. However, it is clear in both sections that the legislature meant to tax only a *part* of the total gross receipts. The legislature could not have intended to tax *more* than the total gross receipts. If one-tenth of the gross receipts were earned in Virginia, the legislature intended to measure the tax by one-tenth of the gross receipts and not by ten times the gross receipts. The language of the steamship company fraction is more defective than that of the express company fraction. § 58-575 uses the words:

". . . that *proportion* of the total receipts . . ."

§ 58-547 uses the words:

". . . that *portion* of the total receipts . . ."

Thus, the express company formula contains within itself a word stating the intent of the legislature to tax only a *portion* of the gross receipts.

The actual measure of the tax is stated in § 58-547:

> "When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; . . ."

The proviso:

> ". . . unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts . . ."

merely points out a method of computing the amount of receipts earned in Virginia. The taxing statute is complete in itself without the proviso, and the proviso itself directs that the formula be not used if it be clearly shown that application of the formula would result in taxing receipts that could not properly be deemed to have been earned within the State.

Heretofore, the Commission has acquiesced in the view that, because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the company to employ the formula based on mileage. In recent years the Commission and the company have by mutual agreement employed a rough and ready formula that, because of changing conditions, is getting out of line and will have to be revised. The statutory formula (with the fraction turned rightside up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low.

The *Spector* case does not invalidate any property taxes but only some excise taxes. Since the tax complained of is a property tax and not an excise tax, it is unnecessary to

decide whether the Delaware corporation is doing an intrastate business in Virginia through the agency or instrumentality of the Virginia corporation.

A corporation is an imaginary person created under and by virtue of a statute that gives it eternal life and its stockholders limited liability. The command of the statute is that this fictitious creature shall be treated as if it were real. When courts, as they frequently do, ignore the corporate entity in order to achieve justice, they necessarily ignore the words of the statute creating the corporation, on the theory that the legislature could not have intended the corporate fiction to be used for a wrongful purpose. The Virginia Court of Appeals in *Beale* v. *Kappa Alpha*, 192 Va. 382 at 399, summed up the law on the subject by quoting from a Texas case:

> " '. . . Just when a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question of fact in each case. As above stated the general rule is that the separate corporate entity of corporations will be observed by the courts, even though one may dominate or control another, or may treat it as a mere department, instrumentality, agency, etc.; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.' "

The Delaware corporation created and uses the Virginia corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia. Since the tax is a property tax it is constitutional even though the taxpayer does no intrastate business.

Hooker, *Chairman*, and King, *Commissioner*, concur.

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DEC 1
HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

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December 12, 1953

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Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported at 194 Va. 757 and 75 S. E. 2d 61. The opinion of the State Corporation Commission of Virginia has not yet been officially reported. For text of opinion see R. 22.[1]

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered March 9, 1953 (R. 56). The petition

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[1] Reference to the pages of the printed transcript of record are made herein as follows: (R. .....). *Italics are supplied unless otherwise indicated.*

for appeal invoking the jurisdiction of this Court under Section 1257(2) of Title 28 of the United States Code[2] was filed May 21, 1953 (R. 58) and was allowed May 28, 1953 (R. 62). This Court noted probable jurisdiction on October 12, 1953 (R. 64).

This case meets the requirements of Section 1257(2) of Title 28 of the United States Code since the validity of Section 58-547 of the Code of Virginia, 1950,[3] which imposes on every express company a license tax for the privilege of doing business in Virginia, is drawn in question on the ground of its repugnancy to the Constitution of the United States when applied to an express company doing solely an interstate business in the state, and the final judgment rendered by the Supreme Court of Appeals of Virginia with respect thereto is in favor of its validity (R. 48).

QUESTIONS PRESENTED

The federal question presented to the State Corporation Commission and the Supreme Court of Appeals of Virginia and on this appeal is:

> Whether Section 58-547, which imposes, *"for the privilege of doing business in this State,* in addition to the annual registration fee and the property tax as herein provided, * * * *an annual license tax"* measured by a percentage of the gross receipts from operations of such companies within Virginia, is valid under the Commerce Clause of the United States Constitution when applied to an express company *doing solely an interstate business in Virginia.*

---

[2] 62 Stat. 929; 28 U. S. C. 1257(2).

[3] Acts of General Assembly of Virginia (herein cited Acts), 1948, Chap. 466, § 219(d), page 924. See Appendix, page 39 of this brief for full text of Article 4, Chapter 12, Title 58 containing § 58-547.

STATEMENT OF THE CASE

Appellant, a Delaware corporation, operates interstate between all the forty-eight states of the United States and the District of Columbia and operates intrastate within all of the states *except Virginia.* The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929), and by this Court, 282 U. S. 440 (1931).[3a] Following that decision, Appellant organized in Virginia a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, for the *sole purpose* of conducting an express transportation business *in intrastate commerce* in that state.

Since its organization, the Virginia Company has done exclusively an intrastate business in Virginia and has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it as well as the license tax imposed under § 58-547, *for the privilege of doing an intrastate express business in Virginia,* based on its total gross receipts each year (R. 15, 45).

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was

---

[3a] This action resulted from the inhibition of § 163 of the Constitution of Virginia forbidding foreign corporations to exercise any of the powers or functions of a public service corporation in the state.

used by it exclusively in *interstate* commerce[4] and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the license tax imposed under § 58-547 *for the privilege of doing an interstate business in Virginia* (R. 44). Although this license tax ostensibly has been assessed pursuant to § 58-547 or its antecedent sections of the Virginia Code which requires an apportionment of its total gross receipts, it has in fact been assessed pursuant to informal understandings resulting from discussions with representatives of the State Corporation Commission.

The methods and formulae employed from time to time to determine the gross receipts of Appellant subject to assessment in Virginia and the amount of license tax annually to be imposed thereon have not been uniform and admittedly have not met the requirements of § 58-547 (R. 14). Prior to 1942 the gross receipts of Appellant taxable in Virginia were determined by applying to the mileage of lines operated in the state an arbitrary or fixed amount per mile, which was varied from year to year (R. 14). In 1942 an understanding, which did not purport to meet the requirements of the antecedent of § 58-547 but was a substitute therefor, was reached between the State Corporation Commission's staff and the then General Counsel of Appellant which has since served as a basis for the assessment of this license tax (R. 14, 46).

The various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under the following form of protest:

---

[4] The Virginia Commission found and the parties have stipulated that Appellant has done no intrastate business in Virginia (R. 20).

"This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

"The business passing through, into or out of this state is interstate business and is not subject to taxation by the state. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $..... reported as 'All receipts earned in Virginia on business passing through, into or out of this state' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore, is beyond the legal authority of the State of Virginia to levy." (R. 19)

Despite these annual protests, no refunds were sought by Appellant until the decision of this Court in the case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), holding invalid the Connecticut tax imposed upon the franchise of a foreign trucking corporation *for the privilege of doing business within* the State when (1) the business consisted solely of *interstate* commerce, and (2) the tax was computed at a nondiscriminatory rate on *that part of the corporation's net income* which was *reasonably attributable to its business* activities within the State. Following

the decision in the *Spector* case, Appellant, by formal petitions filed with the Virginia State Corporation Commission, sought refunds for the taxes paid pursuant to § 58-547 for the years 1950 and 1951 in the amount of $70,665.68, and $66,454.71, respectively (R. 2, 6).

These petitions for refund raised the single question of the repugnancy of § 58-547 to the Commerce Clause of the Constitution of the United States by alleging that the license tax imposed by § 58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States."[5]

The Commission heard the petitions together and dismissed the 1950 petition on a jurisdictional point not pertinent to this appeal. With respect to the 1951 petition, it held that § 58-547 was a *property tax* on the intangible elements of value generated by the employment in business of the physical properties of express companies in the State and not a *license or excise* tax and was, therefore, not violative of the commerce clause of the Constitution of the United States when applied to Appellant, although engaged solely in interstate commerce in Virginia (R. 21, 31).

The decisions of the Commission on both petitions were appealed to the Supreme Court of Appeals of Virginia on a consolidated record. The issue of the validity of the tax as applied to Appellant was raised on the appeal in the assignment of errors and statement of questions involved set forth

[5] Paragraph 6 of 1950 petition (R. 5) and paragraph 7 of 1951 petition (R. 9).

in Appellant's opening brief as required by the rules of the Virginia Court (R. 47).

The Virginia Court held that § 58-547 as applied to Appellant was not repugnant to the Commerce Clause of the Federal Constitution since it was not a tax on the *privilege* of conducting an express business in Virginia as specifically provided in the statute, but was a "property tax" levied on the element of value of Appellant's physical properties created by their employment in business in interstate commerce in Virginia (R. 51). The court's decision was applicable to the petitions for refund for both 1950 and 1951, rendering unnecessary a decision on the jurisdictional question upon which the Commission based its adverse decision on the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional question stated above.

SPECIFICATION OF ERRORS

The following assigned errors of the Supreme Court of Appeals of Virginia are urged on this appeal:

(1) The error of affirming the final orders of the State Corporation Commission of Virginia of June 16, 1952, denying Appellant's petitions for refund and thereby sustaining the validity of Section 58-547 of the Code of Virginia, 1950, in so far as it purports to authorize the assessment of a tax upon the gross receipts of Appellant derived solely from interstate commerce; and

(2) The error of failing to hold that Section 58-547 of the Code of Virginia, 1950, is a privilege or excise tax which, in so far as it purports to authorize the assessment of the tax therein provided against Appellant, contravenes the Commerce Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT

This Court is not bound by the label placed upon a state statute by a state court if the tax affects commerce among the states so directly as to amount to a regulation thereof and it may and should decide for itself the character of the tax and whether, as applied, it affects the constitutional rights of the taxpayer in question.

The scheme of taxation of express companies by the Commonwealth of Virginia includes, in addition to an annual registration fee, (1) a tax on their real estate and tangible personal properties payable to the localities, (2) a tax on their intangible personal property including money in the state payable to the state and (3) "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, * * * *an annual license tax*" based upon the gross receipts of the companies actually earned in Virginia or properly apportioned thereto. This gross receipts tax is in name, terms, nature and effect an excise or privilege tax on the conduct of an express business in, through or into or out of Virginia and, as applied to Appellant, engaged solely and exclusively in an interstate express business through, into and out of Virginia, is in clear violation of the Commerce Clause of the Constitution of the United States as construed and applied in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951).

The action of the Corporation Commission and the Virginia Supreme Court of Appeals in holding the gross receipts tax on express companies, for the privilege of conducting an express business in Virginia, a "property tax" and stating the incidence of the tax to be the element of property value of express companies produced by the employment of their physical properties in business in this State is:

(a) inconsistent with the clear language of the statute as employed by the Virginia General Assembly;

(b) contrary to the intention of the General Assembly as evidenced by the entire scheme and legislative history of taxing express companies in Virginia;

(c) inconsistent with the manner in which this and similar gross receipts taxes has been construed by the taxing officials of Virginia for many years;

(d) at variance with decisions of this and other courts construing similar statutes;

(e) contrary to the inherent nature and effect of a gross receipts tax which does not measure and is not directly related to *values* produced by the operation of a business (net profits) but is a tax on the privilege of conducting the business whether operated at a loss and therefore producing no *values* or whether operated at a profit and thereby producing *values;* and

(f) an unreasonable and unjustifiable attempt to distinguish, where in fact no difference exists, between a tax levied in terms on the privilege of doing business and a tax levied on the going concern or franchise value produced solely by the employment of already taxed physical properties in such business, which value would not exist in the absence of the exercise of the privilege.

ARGUMENT

Introduction

Since there is no dispute that Appellant has done exclusively an interstate transportation business in Virginia, the controlling issue in this case is a determination of the operating incidence of the tax imposed by Section 58-547, which provides as follows:

> "§ 58-547. Annual license tax. — Every such company, *for the privilege of doing business in this State,* in addition to the annual registration fee and the property tax as herein provided, *shall pay an annual license tax* as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State."

If Section 58-547 levies a tax on the privilege of doing an express business in Virginia then the decision in *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951), is controlling and the tax as applied to Appellant, engaged solely in interstate transportation in Virginia, violates the Commerce Clause as a direct burden on interstate commerce. In the *Spector* case it is stated that:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state." (p. 609)

The purpose of this brief is (a) to point out that this Court should decide for itself the incidence of the tax and (b) to establish that that incidence is *the privilege of doing an express business* in Virginia and not such property value as may be produced solely by the exercise of that privilege.

I.

This Court Should Decide the Incidence of the Tax

Appellant respectfully submits that the Virginia gross receipts tax on express companies bears upon commerce among the states so directly as to amount to a regulation thereof in a relatively immediate way. This is the type of statute the construction of which this Court has consistently reserved unto itself.

In *Galveston H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217 (1908), Mr. Justice Holmes in stating that a tax could not be saved by name or form, added:

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, *can take away our duty to consider its nature and effect.*" (p. 227)

In *Wagner* v. *City of Covington,* 251 U. S. 95 (1919), a license ordinance was held valid as applicable to peddlers

despite prior decisions of the state court that the type of activity in question did not constitute peddling. The Court stated that:

> "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution: neither can it render unconstitutional a tax that in its actual effect violates no constitutional provision by inaccurately defining it." (p. 102)

In *Storaasli* v. *Minnesota*, 283 U. S. 57 (1931), on appeal from the Supreme Court of Minnesota, a motor vehicle registration tax claimed to be a property tax, held by the state court to be, "both a property tax and a privilege tax", was held to be a privilege tax. This Court stated that it:

> *"decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights."* (p. 62)

In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940), on certiorari to the Supreme Court of Wisconsin, it is stated:

> *"But the descriptive pigeon-hole into which a state court puts a tax is of no moment in considering the constitutional significance of the exaction."* (p. 443)

See also *Lawrence* v. *State Tax Commissioner*, 286 U. S. 276 (1932); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944).

It is therefore respectfully submitted that this Honorable Court is not bound by the decision of the Virginia court in defining the incidence of the tax under review and should determine for itself its nature and effect and whether it con-

stitutes a burden on interstate commerce when applied to Appellant.

II.

Section 58-547 Imposes an Excise Tax

1.

The Statute, its Terms and Setting

In reaching its conclusion that this is a property tax the Virginia Court has ignored the plain language of the statute as well as the legislative intent revealed in the long history of express company taxation in this State.

(a)

THE PRESENT SCHEME OF TAXATION

An analysis of Section 58-547 in the light of pertinent constitutional provisions and the other statutory provisions for the taxation of express companies as set forth in Article 4, Chapter 12, Title 58 of the Code of Virginia, 1950[6] establishes conclusively that the tax imposed by that section is an *excise* or *privilege* tax and not a *property* tax.

Section 168 of the Virginia Constitution provides for the taxation of all *property* except that specifically exempted. Section 171 of this Constitution segregates all such taxable property according to its characteristic as tangible or intangible property and provides for the taxation of all taxable tangible property (except rolling stock of public service corporations) only by the localities and of all taxable intangible property only by the state.

These provisions are the constitutional authority for the first section of Article 4 (Section 58-546, captioned, "Taxes

[6] See Appendix page 39 of this brief for full text of Article 4.

on *property* of express companies.") which provides that every express company shall "pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such *property* as follows:". The statute then lists the rates of the taxes payable to the *State* on "intangible personal property" and "money" and, following the mandate of the Constitution, provides for *local* levies on "real estate and tangible personal property" of express companies. Thus in the first section of Article 4 the General Assembly has provided a comprehensive plan for the taxation of all types of *property* which express companies normally employ in the operation of their business — money, intangible personal property, tangible personal property, and real estate.

Section 170 of the Constitution authorizes the General Assembly to levy income taxes and "a license tax upon any business which can not be reached by the ad valorem system." In what was clearly an exercise of this authority the General Assembly enacted the second section of Article 4 (Section 58-547, captioned, "Annual *license* tax."), the opening provision of which is as follows:

> "Every such company, *for the privilege of doing business in this State*, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual *license* tax as follows:"

Then follows the rate of tax and a formula for apportioning gross receipts when interstate business is involved. It is significant that the tax imposed by this second section of the Article is *in addition* to "the property tax" imposed by the first section, which specifically includes the state tax on "intangible personal property."

The remaining provisions of the Article are largely ad-

ministrative in nature and, with one exception, are not pertinent here. The eighth section (§ 58-553, captioned "No other taxes on express companies.") provides that "the amount of taxes and licenses imposed by this article and authorized to be imposed *shall be in lieu of all other taxes and licenses,* State, county and municipal, upon all the *property, franchises* and *privileges* of such companies", except motor vehicle licenses and fuel taxes.

The scheme and language of these constitutional and statutory provisions clearly reveals the intended distinction between (1) *ad valorem* property taxes and (2) a license tax, or tax on business measured by gross receipts. *All property,* whether tangible or intangible, is required to be taxed according to value by either the state or the localities depending upon whether this property is classified as tangible or intangible. *That* increase in the value of property, regardless of its classification, attributable to its effective use in business, that is, its "going concern value", which can not be reached by this *ad valorem* system, may be subjected to a license tax by the state.

The simplicity of this scheme contrasts sharply with the misconceived theory by which the Court of Appeals sought to justify its characerization of the *license* tax imposed by § 58-547 as a *property* tax. That misconception appears in *Commonwealth* v. *Baltimore Steam Packet Co.,* 193 Va. 55, 68 S. E. 2d 137 (1951), appeal den'd 343 U. S. 923 (1952), involving a substantially identical scheme for taxing steamship companies, which the Virginia Court considered as controlling in this case. There the Court correctly observed:

> "Title 58 of the Code, Taxation, provides in chapter 12 thereof, sections 58-503 through 58-685, a system of taxation of public service corporations, including railway and canal companies, express companies,

> steamship companies, and others. The general pattern of the system is that these companies pay to the locality taxes on real estate and tangible personal property; to the State taxes on intangible personal property and money, and in addition a tax, called a franchise tax in some cases and a license tax in others, measured by gross receipts. Provision is made for apportionment in the case of interstate transportation when necessary. The value of all property for taxation, tangible and intangible, is fixed by the State Corporation Commission." (p. 68)

but erroneously concluded:

> "It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their *dual* values, the dead value, or 'the bare bones', to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. . . . In its derivation and substance it is a tax *on an element of value of the physical properties* not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (p. 70)

Section 171 of the Virginia Constitution does not segregate the dead elements of physical property for local taxation and its live elements for taxation by the state. There is no justification in either the Constitution or statutes for a distinction, insofar as property taxes are concerned, between so-called "live" and "dead" property values. The constitutional and statutory distinction is between tangible and intangible property and either of these may have both living and dead values according to the manner and efficiency in which they are used. The confusion of the Court in the

Baltimore Steam Packet Co. case was due to this unjustified and improper identification of "dead" values with tangible property and "live" values with intangible property as those terms are used in the statutory scheme described above.

This view clearly does violence to the legislative intent evidenced by the scheme for taxing steamship companies which was under consideration in that case and which is practically identical to the scheme for taxing express companies. The legislative intent clearly revealed in the scheme for taxing express companies should not be frustrated in this case by the same misconception under which the Virginia Court labored in the *Baltimore Steam Packet Co.* case.

(b)

LEGISLATIVE HISTORY

A review of the legislative history of the taxation of express companies confirms this conclusion. The first special tax on express companies imposed in Virginia was in 1856, in the form of a "license" tax measured by total receipts from express company operations in this State.[7] The language of this first gross receipts tax statute throws little light upon the nature of the tax except to characterize it as a *license* tax, but in 1860 when the tax was reimposed the legislature used language which is significant.[8] There, in a separate chapter entitled, "An ACT making regulations concerning licenses," the legislature provided:

> "39. *On every license* to a person or company carrying on an express business for compensation [there shall be a tax of] fifty dollars; and in addition thereto, every such company shall make a return to the auditor

[7] Acts, 1855-56, Chap. 9, p. 15.
[8] Acts, 1859-60, Chap. 2, p. 38.

> of public accounts . . . of the total receipts of such company on account of its operations within the state of Virginia . . . [and] shall pay on the total receipts so reported, a tax of one-half of one per centum. . . . *Such license shall give privilege throughout the State.*"

Thus, almost from its inception this tax has been the price paid by express companies *for the privilege of doing an express business in Virginia.* Express companies continued to be taxed on the basis of their gross receipts at increased rates until 1870 when, in January of that year, Virginia's Post-Civil War Constitution[9] was approved by Congress. By that Constitution Virginia embraced with vigor the principle of *ad valorem* property taxation which had never been supported in the *ante bellum* days. In addition to the direct tax on *property* according to *value*, Article *X* of that Constitution authorized the General Assembly to levy an income tax and a *license* tax upon all businesses "which cannot be reached by the *ad valorem* system.[10]

The first General Assembly to function under this new Constitution promptly imposed a *state ad valorem* tax on all the real and personal property of express companies. In addition, this legislature rejected, temporarily, the gross receipts tax and imposed, in addition to the property tax, a 5% tax on the net income of all express companies earned on business done in this State.[11] This net income tax on express companies was abandoned in 1872 when gross receipts were again adopted as the measure (at the rate of 2%) of the tax on express companies in addition to the *ad valorem* property tax.[12]

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[9] Constitution of Virginia, 1869.

[10] Idem, Article *X*, § 4.

[11] Acts, 1869-70, Chap. 226, p. 354, 356.

[12] Acts, 1871-72, Chap. 385, p. 474.

These early acts under the new Constitution omitted the descriptive word "license" but in 1882 the general revenue act, after imposing the *ad valorem* property tax, clearly described the character of the additional special tax on express companies when it provided:

> "No express . . . company, shall transact such [express] business without a license authorized by law. . . . *The specific license tax* on any express . . . company . . . shall be one-half of one per centum on the gross earnings of such company."[13]

In 1884, the net income of express companies earned or apportioned to this State was again made the basis for the special tax in addition to the *ad valorem* tax on all the real and personal property of these companies.[14] Again the descriptive term "license" was omitted. But in 1890 express companies were made the subject of a specific *license* tax, based on neither gross nor net receipts but on *the mileage operated* by each company in Virginia.[15] Express companies operating in excess of 1000 miles paid a flat "license tax" ("in addition to the property tax") of $500.00; those with less mileage, $300.00. Although there was nothing distinctive about the language of the act imposing this tax it is noteworthy that this statute was entitled a *"License* on offices of express companies". Clearly, there is nothing to indicate that this was intended to be a *property* tax or anything except what it was expressly said to be: *a tax on the privilege of operating an express business in Virginia.*

This license tax was next placed on a more graduated scale[16] and in 1908 replaced by a flat $3.00 per operating

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[13] Acts, 1881-82, Chap. 119, p. 508.

[14] Acts, 1883-84, Chap. 450, p. 572.

[15] Acts, 1889-90, Chap. 244, p. 211.

[16] Acts, 1899-1900, Chap. 499, p. 534 (ranging from $250.00 to $2,750.00 according to operating miles).

mile *license* tax.[17] The language of the 1908 Act is significant. Chapter 165 amended and re-enacted Sections 29 and 30 (dealing with the assessment and taxation of express company property) so as to provide in pertinent part as follows:

> "§ 29. Each express company doing business in this State . . . shall report annually . . . to the State corporation commission, *all* of its real and personal property of every description in this State belonging to it. . . .
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> * * *
>
> "The State corporation commission shall assess upon said *property* the taxes imposed thereon by law and upon said companies the *license* tax imposed by law."
>
> "§ 30. On the real and personal property of every express company doing business in this State, . . . there shall be a tax of twenty cents for each one hundred dollars of the assessed value of the real estate and tangible personal property, and a tax of twenty-five cents on every one hundred dollars of the assessed value of the intangible property of every such company; . . ."

Chapter 179 amended and re-enacted § 31 (dealing with the license tax) to provide:

> "§ 31. Each and every express company doing business in this State *in addition to the property tax,* shall for the *privilege of doing business* between points within this State, pay a *license* tax as follows, to-wit:
>
> "Each and every express company operating a mileage in this State shall pay a *license* tax of (3) three dollars for every mile so operated in this State, and no express company *which shall have paid the privilege tax hereby imposed,* shall be required to pay an additional

[17] Acts, 1908, Chap. 165, p. 240, Chap. 179, p. 257.

tax to the State *except the property* tax hereinbefore referred to and its annual registration fee."

Certainly this express company license tax could not be more clearly distinguished from the tax on all of the property of these companies. Thereafter the taxation of express companies remained unchanged (except that the rate was increased),[18] until 1915, when gross receipts was again adopted as the basis for *measuring* the *license* tax on express companies.[19] This "license tax" of 1.25% of all gross receipts earned in or allocated to Virginia "for the privilege of doing business in this State", was, as theretofore, "in addition to the annual registration fee and the property tax herein provided".

Also, in 1915, the General Assembly undertook for the first time *to segregate the subjects of state and local taxation.* Until that time the localities had generally been free to tax property, including that of public utilities, according to their revenue needs.[20] The difficulties and inequalities which arose when both state and local authorities sought to tax the rolling stock of railroads ultimately led to tax segregation. As first enacted,[21] the segregation law provided that all real and tangible personal property (except the rolling stock of steam railways) and merchant's capital should be reserved only for *local* taxation (except that real property would temporarily remain subject to limited State taxation), while such rolling stock and all taxable intangible personal property should be reserved for taxation only by the *State.* Thereafter express companies paid, in

[18] Acts, 1910, Chap. 111, p. 164 (to $6.00 *per mile*).

[19] Acts, Extra Session 1915, Chap. 141, p. 204.

[20] Acts, 1879-80, Chap. 106, p. 82; see *Baltimore & Ohio R. Co.* v. *Koontz,* 77 Va. 698 (1883).

[21] Acts, Extra Session, 1915, Chap. 85, p. 119.

addition to the license tax, the state tax on intangible personal property and the local taxes on their real and tangible personal property, as assessed by the State Corporation Commission. This system has remained the same since 1915 except for changes in tax rates, exemption of municipal bonds from taxation as intangible personalty and the completion of the State's system of segregation of property for tax purposes in 1926 by the elimination of *all* state taxes on real property.[22]

This review of Virginia taxes on express companies discloses (1) that with few exceptions the tax under consideration has always been *described* as a *license* tax, (2) that most such statutes have made payment of the tax a condition precedent to the right to engage in that business or have characterized the tax as one on "the privilege of doing business in this state", (3) that this special tax has, since 1870, always been "in addition to" the *ad valorem* property tax on all real and personal property of express companies, and (4) has always been measured by either gross receipts, net income or operating mileage.

The decision appealed from disregards the legislative intent evidenced by this consistent scheme of taxation and erroneously holds that (despite the clear distinction between *property* and *license* taxes evidently in the minds of the legislators and the unequivocal description of the intended incidence of the tax as "the privilege of doing business in this State") what was really sought to be taxed was some "element of value of the physical properties" of these express companies.

The history of the special tax on *railroads* also reveals the nature of the tax on *express* companies. Both industries were first specially taxed in the same year and by the same

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[22] Acts, 1926, Chap. 576, p. 955. This is now Code of Virginia, 1950, §§ 58-9, 58-10, and was made permanent by the amendment of Section 171 of the Constitution, ratified June 19, 1928.

Act,[23] the railway tax first being measured *by passenger miles*. A gross receipts tax was soon imposed on railroad companies[24] which were thereafter taxed on that basis until 1870. In that year railways, like express companies, were subjected to *ad valorem* property taxes and a net income tax.[25] Railroads were taxed in this manner, but at increased rates until 1902 when Virginia's present Constitution became effective. The provisions of this new Constitution concerning railroad taxation have the detail of a code and, together with the report of the debates of the Constitutional Convention, reflect the concern of the delegates for the taxation of this kind of transportation company.

Section 176 of the Constitution provides for the assessment of all *railroad* property (except its franchise and nontaxable stock) by the State Corporation Commission, and its taxation by the State and localities at uniform rates. As originally adopted this section prohibited a tax on the net income of railroads but this provision was deleted by the amendment ratified June 19, 1928.

Section 177 of the Constitution authorizes the levying against each railroad corporation of an annual franchise tax of a percentage of gross transportation receipts to be fixed by the General Assembly "for the privilege of exercising its franchises in this State". The term "gross transportation receipts" is defined by Section 178 to permit apportionment in the case of interstate lines. Section 179 describes the annual reports required to be made to the Commission.

These constitutional provisions were promptly put into effect by the General Assembly which adopted a new gen-

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[23] Acts, 1855-56, Chap. 9, p. 15.
[24] Acts, 1859-60, Chap. 1, p. 21.
[25] Acts, 1869-70, Chap. 226, p. 355.

eral revenue law imposing on railroad companies the *ad valorem* property taxes and the new *franchise* tax measured by gross receipts.[26] This law is the same today except as changed by tax rate increases and segregation.

It is immediately apparent that railroad and express companies have run parallel if not identical tax courses. The railway tax has never been classified as a "license" tax (nor the express company tax as a "franchise" tax). Indeed, this special tax on railroads had no name at all until denominated a *franchise* tax in the 1902 Constitution. It has never been held that the franchise tax on railroad corporations was a property tax or any other kind of tax except what it is described in the Constitution to be: a tax "for the privilege of exercising its franchises in this State."[27] Moreover, there is strong reason to believe the draftsmen of this section of the Constitution *specifically intended to impose an excise tax.*

The report of the debates[28] reveal that in response to a question regarding Section 177, the spokesman for the committee which drafted the provision indicated that it was copied from the Maine statute in the light of the construction placed upon that statute *by this Court* in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891), that it imposed an *excise* tax. Also, in at least one case the Virginia Court has held that the railway gross receipts tax is a *franchise* tax as distinguished from a tax on the property used to produce those gross receipts. In *Virginia Electric & Power Co.* v.

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[26] Acts, Extra Session 1902-3-4, Chap. 148, p. 155. Actually, in its haste, the General Assembly anticipated the ratification of the new constitution and by an Act approved in April, 1902, but to become effective on January 1, 1903, adopted the provisions concerning railroad taxation. Acts, 1901-02, Chap. 677.

[27] Constitution of Virginia, 1902, § 177.

[28] *Debates of the Constitutional Convention of Virginia*, 1901-2, II, p. 2671.

Commonwealth, 174 Va. 316, 6 S. E. 2d 680 (1940), the Court, in sustaining the application of this tax to the gross receipts of a street railway, earned in part by the use of buses, said:

> "So long as its present charter powers are unchanged it is an electric railway corporation with power to operate street cars and buses in the four cities of Richmond, Petersburg, Norfolk and Portsmouth, *and it is this power or right or franchise* upon which the State levies a tax, to be measured by the prescribed percentage of its gross transportation receipts derived from its entire transportation system." (p. 328)
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> * * *
>
> ". . . the tax of which the appellant corporation complains is a *franchise* tax upon its *powers* as an electric railway corporation." (p. 329)

Upon these considerations it is clear that the railway *franchise* tax is not a *property* tax but an *excise* paid for the privilege of operating between points in this State and measured by the most commonly accepted indicator of the extent of that privilege: gross transportation receipts. The express company license tax is so nearly identical historically and in terms that the same is necessarily true of it. Indeed, the long use of operating mileage as a basis for measuring the express company tax suggests, even more than in the case of railways, an excise or privilege tax, for operating mileage gauges more accurately than gross receipts *the extent or scope of the privilege covered by the license.*

The decision of the Commission in the present case, affirmed by the Virginia Court, clearly and erroneously disregards the plain language and obvious meaning of § 58-547 as well as its antecedent and companion statutes, ignores the

long and generally consistent method of express company taxation in Virginia and departs without justifiable reason from the holding which clearly characterizes the practically identical railway tax as a *franchise* or *privilege* tax.

2.

Administrative Interpretation of Gross Receipts Taxes in Virginia

The State Corporation Commission of Virginia recognized for many years that license taxes on certain transportation companies were not levied on their *properties* within the State and, when sought to be applied to their gross receipts from interstate operations, were a direct burden on interstate commerce. This is indicated by the Commission's consistent practice of avoiding the imposition of these taxes on receipts from business passing through, into or out of the State strictly in accordance with the statutory formulae.

In the case of the license tax on express companies the Commission first employed, in lieu of the full gross receipts statutory formula, an arbitrary fixed amount per mile operated in the State to determine the tax. After 1942, the Commission used the arbitrary formula described in Exhibit 8 (R. 46). This attitude of the Commission indicated an administrative purpose to avoid the heavy burden on interstate commerce which the gross receipts tax would have imposed if applied strictly in accordance with the terms of the statute. Needless to say, the Commission's concern with the burden of this tax on interstate express companies was because it then considered the tax to be a privilege tax, for it would have had no occasion for such concern had it considered the tax to be a property tax.

In the case of the similar tax on steamships and other

water carriers[29] the Commission had not since 1915, when that statute was enacted, taxed water carriers on receipts from interstate business until 1950, when it reversed its administrative interpretation of 35 years standing and assessed a gross receipts tax on *all* receipts of water carriers in Virginia on the *new* theory that the tax was a *property* tax and not a *privilege* tax. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137 (1951), which upheld this *new* judicial interpretation, the reason for the Commission's earlier administrative interpretation is explained:

> "The majority of the Commission *felt bound by the fact that not since 1915*, when the present section 58-575 was enacted as section 31 of Chapter 141, pp. 197, 206, Acts, 1915, *has the Commission taxed water carriers on receipts from business 'passing through, into or out of this State'*. This has been because in 1915 the Attorney General's office advised the Commission that that feature of the statute was unconstitutional." (p. 70)

The *Baltimore Steam Packet Company* case was decided December 3, 1951. The General Assembly of Virginia met in January, 1952, and immediately confirmed the prior administrative interpretation of § 58-575 by amending it to provide that such taxes should be measured *only* by their gross receipts derived from *intrastate* commerce.[30] There is nothing whatever in this enactment indicating a legislative purpose to impose a *property* tax determined by a certain percentage of the gross receipts of such companies. On the contrary, the legislature again re-enacted the tax as "an annual State license tax" upon such companies and de-

[29] Section 58-575 of the Code of Virginia 1950.

[30] Acts, 1952, Chap. 486, page 779.

clared it to be "*in addition* to the annual registration fee and *property* tax" imposed upon such companies by the preceding sections.[31] This action of the legislature alone justifies restoring to the gross receipts taxes imposed upon transportation companies the meaning traditionally accorded the language of §§ 58-575 and 58-547.

Appellant respectfully submits, therefore, that the action of the General Assembly in amending § 58-575 immediately after the decision by the Virginia Court in the *Baltimore Steam Packet Company* case definitely establishes the legislative intent to impose a *privilege* rather than a *property* tax. If there was any intention on the part of the General Assembly that this tax should be a *property* tax, there could have been no basis for distinguishing between property derived from intrastate commerce and that produced by interstate commerce.

3.

Prior Decisions of This Court and of State Courts Construing Gross Receipts Taxes

There are numerous cases in which gross receipts and similar taxes on express companies and other public service companies have been held to be *privilege* taxes rather than *property* taxes.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise*

[31] § 58-570 to § 58-574 of Article 7, Chapter 12, Title 58 of the Code of Virginia, 1950, as amended.

or privilege tax and the state sought to support it as a tax on *property* represented by the *value* of the company's franchise. This Court, reversing the New Jersey Court, held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 345. Galveston, H. & S. A. R. Co. v. Texas, supra, 227. Meyer v. Wells, Fargo & Co., 223 U. S. 298. U. S. Express Co. v. Minnesota, 223 U. S. 335. Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295, 297. Cudahy Packing Co. v. Minnesota, 246 U. S. 450. U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 329. Pullman Co. v. Richardson, supra." (p. 349)

In *Ohio Tax Cases*, 232 U. S. 576 (1914), the Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912), a gross revenue tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

Of especial significance is *American Barge Line Co.* v. *Koontz*, 68 S. E. 2d 56 (W. Va. 1951), in which the Supreme Court of that state held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a *privilege* tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case repre-

sents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict on a question arising under the Constitution of the United States, between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation among the states will be achieved.

Thus the authorities in which the question has been specifically presented fully support the position that the tax imposed by § 58-547 is a *privilege* tax and not a *property* tax.

4.

The License Tax Imposed by § 58-547 Is Designed to Measure the Extent of the Privilege Exercised by Express Companies in the Conduct of Their Business, and Is Not a Tax Upon the Going Concern Value of Property So Employed.

The tax imposed by § 58-547 is measured by the *gross* receipts of express companies derived from intrastate business done in Virginia and interstate business apportioned to Virginia and is therefore *levied in direct proportion to the extent that the privilege of carrying on an express business in Virginia is exercised and not necessarily to the value (net profits) produced by the exercise of that privilege.* The tax is on the privilege itself and nothing else, for it must be paid regardless of whether the operation of an express company produces *value* by operating at a profit, or produces no value by operating at a loss. If this were a tax on the *value* produced by the exercise of the privilege, as the Commission and the Virginia Court hold, it would have to be levied on the *net* profits and not on the *gross* receipts. Earnings after expenses and other charges, and not gross receipts, *measure*

the value of property produced from the exercise of the privilege.

This Court in *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321 (1918), discussed this significant difference as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." (pp. 328-329)

The basic error of the Virginia Court lay in its failure to recognize this fundamental distinction, or its refusal to do so, in order to *classify* the tax as a *property* tax. Without that classification it is impossible to support the Commonwealth's right to levy the tax against Appellant, engaged solely in interstate transportation in the state. The Virginia Court disclosed its awareness of this situation in its earlier decision in *Commonwealth* v. *Baltimore Steam Packet Co., supra,* concerning a similar gross receipts tax on water carriers. There the taxpayer was admittedly engaged in both interstate and intrastate commerce in Virginia. After making specific reference to the similar tax on express companies, the Virginia Court refused to decide the case *solely* on the ground that the tax was levied for the privilege

of carrying on *intrastate* business (fairly computed by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate business) for which there was ample precedent,[32] but preferred to lay the ground work for sustaining the gross receipts tax against Appellant by assigning as an alternate ground for its decision that the tax was levied *on the augmentation in value of the physical assets* of the taxpayer in Virginia resulting from their use as *part of a going business* (R. 51).

The Virginia Court made it quite plain that the *property* which it conceived to be the *subject* of the gross receipts tax was the additional value of the physical properties *located in this state,* generated by their employment as part of a going business. In both *Baltimore Steam Packet Co.* and the present case, the Court described the property it considered to be taxed as follows:

> "In its derivation and substance it is a tax *on an element of value* of the physical properties not reached by the tax levied by the localities, but reserved to the state, and not otherwise taxed" (R. 50).

The Court in this case further described this property as follows:

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[32] In *Spector Motor Service* v. *O'Connor, supra,* the Court stated:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co.* v. *Stone, supra: International Harvester Co.* v. *Evatt,* 329 U. S. 416; *Atlantic Lumber Co.* v. *Comm'r of Corporations and Taxation,* 298 U. S. 553." (p. 609)

> "The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value or the intangible value which it created by the concerted utilization of the congeries of unrelated items." (R. 51)

Appellant freely admits that a going business, if operated at a profit or if there is a reasonable expectation of earning a profit on future operations, may have a going concern or what is sometimes called an "organization" value. The difficulty with the Virginia Court's theory is that the tax in question does not measure that value.

In 1951 the total assessed value of all of Appellant's real and tangible personal properties in Virginia was $129,279.00 and in 1950 it was $119,979.00 (Ex. 6, R. 44). In holding the gross receipts tax to be a *property* tax the Court and the Commission in effect makes the absurd determination that the "going concern value" properly to be attributed to *those physical properties* was $3,090,916.55 in 1951 and $3,286,775.70 in 1950 or in each year approximately 2390% of the value of such assets from which such increment is said to accrue. This in and of itself is so far from the realities of economic life as conclusively to demonstrate the error of the decision that this tax is a *property* tax.

The gross receipts earned by the business of Appellant in Virginia is a proper measure of the exercise of the *privilege* of doing the interstate Virginia business if that privilege were lawfully taxable in Virginia. It measures nothing else. It is a proper measure of what the General Assembly had in mind when it levied a license tax for *the privilege of doing business in Virginia*. But because of the action of the State itself in refusing to permit *Appellant* to carry on in Virginia any *intrastate* commerce,[33] that license tax is not

[33] See p. 3, *supra*.

valid as to Appellant because it is a tax on the privilege of engaging in interstate commerce. Substance can not be ignored and the tax given a new form merely to avoid this adverse economic consequence to the Commonwealth. Characterization of the tax as a *property* tax at such a late hour in the shadow of *Spector Motor Service, Inc., supra,* is an obvious resort to form since a *property* tax classification was necessary to support the right of the Commonwealth to levy the tax.

The tax cannot fairly and realistically be said to be a tax on *property,* tangible or intangible. It is completely unrealistic to say that in 1951 Appellant used in Virginia property of a *total* value of $3,220,195.55, composed (1) of a *physical* value of $129,279.00 and (2) a going concern value of $3,090,916.55, and in 1950 property of a total value of $3,406,754.70, composed (1) of a *physical* value of $119,979.70 and (2) a going concern value of $3,286,775.70, or in both years almost 24 times the value of the physical property alone,[34] and yet that is the practical consequence of the form to which the Virginia Court resorted to sustain the tax. Appellant had no such property, no one would have paid anything for any such assumed property values because the net income from the business has no relation to the assumed property value and it is not possible to earn a return on that assumed value.

Obviously, the General Assembly was not attempting to value property in adopting the gross receipts tax and the decision of the Court below cannot have the effect of creating such a property value.

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[34] Similar ratios have existed between the tangible value of Appellant's property in Virginia and its gross receipts allocated to Virginia in every year since 1931. (See Exhibit 6, R. 44).

CONCLUSION

The plain language of the statute, its legislative history, the long administrative interpretation applied to it and similar taxes by the taxing authorities of Virginia prior to 1948, the decisions of this Court and those of State Courts and the inherent nature of a gross receipts tax all point to the necessary conclusion that Section 58-547 imposes an *excise* or *privilege* tax and is not a *property* tax on the intangible increment of value of the physical properties of Appellant in Virginia produced by the use of those assets in a going business. *The tax measures the extent to which the privilege is exercised but is no indication of such property values as may be produced by the exercise of the privilege.*

In addition to the foregoing, it is submitted that there is no less burden on, or any less regulation of commerce, or in fact any substantial difference in a tax on property values produced *solely* by the exercise of the privilege of doing an interstate express business (which values could not and would not exist in the absence of the exercise of that privilege), and a tax on the exercise of the privilege itself. Appellant submits that if there is a distinction it is without substantial difference since in reality both are a direct tax on interstate commerce.

The Commonwealth of Virginia has many constitutional ways of raising revenue and it is not dependent on taxes derived from the conduct of interstate commerce. This Court has said in *Freeman* v. *Hewitt*, 329 U. S. 249 (1946):

> "To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function." (p. 253)

For the foregoing reasons, Appellant respectfully submits that the judgment appealed from should be reversed and the statute as construed by the Virginia Court and applied to Appellant declared unconstitutional.

Respectfully submitted,

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December 12, 1953

Article 4, Chapter 12, Title 58 of The Code of Virginia, 1950

§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they have taxable properties located, the taxes levied on such property as follows:

(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

(3) There shall be no local levies assessed on such intangible personal property or money;

(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 923.)

§ 58-547. Annual license tax.—Every such company for

the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, §219; 1948, p. 924).

§58-548. Annual report.—Every company doing an express business in this State on any railroad, steamboat, vessel, bus, truck, aircraft of any kind or on any other kind of vehicle or instrumentality of transportation shall report annually on or before the first day of May to the Commission all of its real and personal property of every description in this State belonging to it as of the beginning of the first day of January preceding showing particularly in what city, town, county and school district the property is located and classifying the same under the following heads:

(1) All of its real and personal property of every descrip-

tion in this State showing the cost and market value of such property;

(2) The total number of miles operated within and without this State for the year ending December thirty-first next preceding;

(3) The gross receipts from operation entirely within this State and if operations are partly within and partly without this State the entire gross receipts from operation for the year ending December thirty-first next preceding;

(4) Any and all other information, in such manner and in such detail as the Commission shall require. (1928, p. 148; 1942, p. 408; Tax Code, §218.)

§58-549. Assessment of value of property.—The Commission shall, after thirty days' notice previously given by it to the president or other proper officer, assess the value of the property of each of such companies.

Should any such company fail to make the report required by this article on or before the first day of May the Commission shall, at such time as it may elect, upon the best and most reliable information that can be procured, assess the value of the property of the company within this State and shall ascertain the information required herein. In the execution of such duty the Commission shall be authorized and empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§58-550. Copies of assessment for Comptroller and company.—A certified copy of the assessment when made shall be immediately forwarded by the clerk of the Commission to the Comptroller and to the president or other proper officer of each such company. (1928, p. 149; 1942, p. 409; Tax Code, §218.)

§ 58-551. Copy of assessment for local authorities.—The clerk of the Commission shall furnish to the council of every city and town and to the board of supervisors or other governing body of every county wherein the property belonging to the company is situated a certified copy of the assessment made by the Commission of such company's property. The assessment shall definitely show the character of the property and its value and the location for the purpose of taxation in each city, town, county and district, so that city, town, county and district levies may be imposed upon the same. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-552. Payment of tax.—Such company shall pay into the State treasury by the first day of October following the assessment the taxes assessed against it. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-553. No other taxes on express companies.—The amount of taxes and licenses imposed by this article and authorized to be imposed shall be in lieu of all other taxes and licenses, State, County and municipal, upon all the property, franchises and privileges of such companies; provided, that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law. (1919, p. 69; 1926, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p. 924.)

§ 58-554. Penalty for failure to pay.—Any such company failing to pay such taxes into the State treasury within the time herein prescribed shall incur a penalty thereon of five per centum, which shall be added to the amount of the taxes. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

§ 58-555. Penalty for failure to report.—Any such com-

pany failing to make the report required by § 58-548 within the time herein prescribed shall be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars for each day such company may be in default in making such report, the fine to be imposed and judgment entered therefor by the Commission after thirty days' notice to any such defaulting company to appear before the Commission and show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (1928, p. 149; 1942, p. 409; Tax Code, § 218.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953.

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

REPLY BRIEF FOR APPELLANT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

REPLY BRIEF FOR APPELLANT

I.

Preliminary Statement

With Appellee's Statement of the Case, we are in substantial agreement. Its statement of the Questions Presented, however, is incomplete. Appellant contends as an alternate grounds that even if the tax is assumed to be a property tax, which it does not concede, the gross receipts of Appellant measure *only the value of its right to carry on business wholly in interstate commerce* and the tax is, therefore, a direct burden on interstate commerce regardless of its nature. Virginia has not granted Appellant any franchise and it does not have the power to tax the value of the right to do an exclusively interstate business guaranteed to Ap-

pellant under the Commerce Clause of the Constitution of the United States. The effect of the tax as applied here, regardless of the name by which it is called, is to burden a privilege not extended or granted by the taxing authority and which the taxing authority is powerless to withhold.

Consideration will now be given (1) to the extent to which this Court is bound by Virginia decisions as to the nature and effect—the actual operating incidence—of Section 58-547, and (2) to the Virginia authorities and the decisions of this Court relied upon by Appellee, and a brief discussion of the true burden of the tax in question.

II.

Extent to which Supreme Court Should Examine Virginia Decisions as to Nature and Effect of Section 58-547

The opinions of this Court often contain the statement that it is always free to determine for itself the nature and effect of a state tax (Opening Brief, p. 11-12). Appellee, however, points out that in many of its other opinions the Court has stated that it is bound by the construction given to state statutes by state courts. Certainly, state courts must interpret the language of the statutes of their state and must fix the *scope* of the tax, if that is not entirely clear from the language. *Aero Mayflower Transit Company* v. *Board of R. R. Commissioners*, 332 U. S. 495 (1947), relied upon by Appellee, is a typical example. In that case the Montana court construed a state tax statute to apply only to revenues derived from the taxpayers' operations within the state, although the language of the statute was susceptible of a broader construction. This Court is naturally bound by this interpretation unless it be an obvious evasion for avoiding a contrary ruling under Federal law. But when the *scope*

of the tax has been found by the state court this Court must consider for itself (a) whether there has been a palpable evasion of its real meaning and (b) whether the tax is in fact a tax on interstate commerce. That is what Appellant is asking this Court to do.

III.

Virginia Decisions

Appellee contends that *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948), represents a determination in 1948 that a gross receipts tax on the franchise of a public utility is a property tax on the going concern value increment of the physical properties of the taxpayer, "before the *Spector* case* had been heard of in Virginia." The sole inquiry in the *City of Richmond* case was whether the City could require that the real estate and tangible properties of the public utility be taxed at 100% of its actual value as other properties were alleged to be taxed by that City. The Court held simply that the real estate and tangible personal property of public utilities were classified for taxation separately from the property of other taxpayers assessed locally, that local assessment ratios did not govern, and that the State Corporation Commission was justified in assessing on a basis of state-wide uniform equalization. *There was no issue before the court as to the subject, the nature or the effect of the gross receipts tax on public utilities to say nothing of the gross receipts tax on express companies.*

By way of describing the general scheme of taxation of public service corporations in Virginia, the Court, in passing, referred to the "franchise tax" on public utilities measured

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* *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602 (1951).

by gross receipts and pointed out that it was for the support of the state government and therefore the assessment of tangible properties for taxation *by the localities* must exclude any franchise value. Since this is the most that may fairly be attributed to the *City of Richmond* case, the Attorney General was plainly in error in asserting that in that case the Virginia Court decided that the franchise tax on public utilities, or any similar tax, was a *property* rather than a *privilege* tax. Appellant contends that a franchise tax measured by gross receipts is necessarily a tax on the *privilege* of exercising that franchise and not on the going concern or "franchise value" which the exercise of that privilege generates only when the enterprise is profitable.

Although the final decision was not rendered until 1951, most well-informed lawyers were well aware of the *Spector* case and its possible implications long prior to 1948, because of its history in the District Court, the Court of Appeals and this Court, dating back to 1942. Counsel for Appellee therefore speak only for themselves when they state that the *Spector* case had not been heard of in Virginia when the *City of Richmond* case was decided in 1948.

Appellant relies on *Virginia Electric and Power Company* v. *Commonwealth*, 174 Va. 316, 6 S. E. 680 (1940), to show that the Virginia Court has expressly stated that a *similar* gross receipts tax on electric railroads is a tax on the "power or right of franchise" of such companies as distinguished from a tax on the property used to produce those gross receipts. The unequivocal language of the Virginia Court in this case is a most positive expression of what it conceives to be the nature of a franchise tax measured by gross receipts.

Appellee refers to the statement of the Corporation Commission that its assessment of the real estate and tangible

properties of public service corporations does not include the intangible elements of value which may be attributable thereto, and that the "franchise value" of those companies is assessed at 100%. Reliance is also made upon the reference, in the debates in the Constitutional Convention of 1902, to the franchise of public service corporations as a separate object of taxations. The reference to "franchise value" by the Commission and in the constitutional debates were made with respect to Virginia public service corporations *operating under franchises granted by the Commonwealth.* The Virginia Constitution provides that *only* Virginia corporations may operate intrastate as public service corporations* in Virginia and such corporations are required to obtain operating franchises from the Commonwealth. But Virginia has refused Appellant a franchise to do an intrastate express business (See Opening Brief, p. 3) and does not have the power to tax the value of its right to do an exclusively interstate business guaranteed to it under the Commerce Clause of the Constitution.

The *general* statements of the individual members of the Constitutional Convention quoted by Appellee (Brief, p. 18, 19) must give way to the specific statement in the debates (referred to in Appellant's Opening Brief, p. 24) of the fact that the gross receipts tax on railroads, which furnishes the general pattern followed by other gross receipts taxes of public service corporations in Virginia, was patterned after the Maine statute as construed in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891). In that case the tax had been construed by this Court to be an *excise* or privilege tax eleven years before the Virginia Constitutional Convention of 1902. This is the best evidence of the intention of the framers of the Constitution of Virginia with respect to the *nature* of such a tax.

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* Constitution of Virginia, § 163.

IV.

Decisions of this Court

Since the Virginia system of gross receipts taxes was admittedly patterned after the tax considered by this Court in *Maine* v. *Grand Trunk Railway Co., supra,* Appellee has seized on the speculative reference in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas,* 210 U. S. 217 (1908), that the Maine tax "may be said to have been made a measure of the value of the property per mile" (p. 226) and urges this to prove that such a tax was a property tax. In the majority opinion in *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1948), this Court made it clear that the above-quoted statement from the *Galveston* case was in error. The Court stated:

> "That case [referring to Maine v. Grand Trunk Railway Co.] sustained a state statute which imposed upon an interstate railroad corporation 'an annual excise tax (and measured by apportioned gross receipts), for the privilege of exercising its franchises in this state.'" (p. 667)

The above statement contains the following footnote explanation:

> "Nothing in the *Grand Trunk* opinion suggests the explanation hazarded by Mr. Justice Holmes in *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 226, that the tax in the *Grand Trunk* case was sustained on the ground that it was imposed in lieu of ad valorem taxes."

In the dissenting opinion in *Interstate Oil Pipe Line Co.,* Mr. Justice Reed pointed out that *Grand Trunk,* "concerning a tax on the privilege of exercising a franchise in Maine," could only be reconciled with later cases of this

Court if Grand Trunk *did an intrastate as well as an interstate business* (p. 681). After stating that "a state franchise tax for that is permissible," the dissenting opinion emphasizes that Grand Trunk was not "a precedent for the tax on the privilege of doing an interstate business" (p. 681).

In its consideration of this case it is of the utmost importance that the Court always keep in mind, that the Constitution of Virginia, prohibiting *foreign* public service corporation from doing a public service business in Virginia, gave rise to this unique case and at the same time makes inapplicable as precedents *all* the cases cited and relied upon by Appellee, for in each the taxpayer was engaged, at least to some extent, in intrastate commerce.

Appellee lays considerable stress upon *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), from which it quotes at length (Brief, p. 7, 8). That case involved a tax, "in form and substance, an excise conditioned on the carrying on of a *local* business" distinct from interstate commerce. Such a tax could not be levied by Appellee here because Appellant is not engaged in local business operations in Virginia. As the dissenting opinion in *Interstate Oil Pipe Line Co., supra*, pointed out, this is enough to distinguish *Maine* v. *Grand Trunk*. It is also sufficient to distinguish *all* the other cases involving privilege or franchise taxes cited in the quotation from *Western Livestock* case by Appellee (Brief, p. 7, 8) as well as *Interstate Oil Pipe Line Company*. In that case the deciding vote for the validity of the tax was by Mr. Justice Burton who concurred in the result solely because he considered the tax to be on intrastate or local activity.

Even if, contrary to our belief, the tax here in question, properly construed, can be said to be a property tax, this Court has never approved such a tax except where some

intrastate or local activity was involved. In *U. S. Express Co.* v. *Minnesota*, 223 U. S. 235 (1912), the tax, measured by gross receipts partly from interstate and partly from intrastate commerce, was "in lieu of all taxes upon" the property of the taxpayer. The Court stated:

> "The statute was not aimed exclusively at the avails of interstate commerce * * * but, as in the *Maine Case*, was an attempt to measure the amount of the tax within the admitted power of the state by income derived, in part, from the conduct of interstate business." (p. 347)

See *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450 (1918), where a similar gross receipts tax was held to be a property tax and sustained because a portion of the gross receipts were derived from intrastate commerce.

Appellee contends that *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1947), supports the tax in this case. There, in addition to *ad valorem* taxes, Mississippi imposed "a franchise or excise tax" based on the value of the capital used, invested or employed within the state. The levy was sustained on the ground that the state court had construed the statute to be a tax imposed not on the privilege of engaging in interstate commerce, but a tax solely upon *"the local activity* of maintaining, keeping in repair and otherwise in manning the facilities" situated in Mississippi. There has never been any suggestion by the Virginia Commission, or the Virginia Court, that the gross receipts tax on express companies *is upon any local activity*, as applied here, for both the Commission and the Court below held that there is not any local activity carried on by Appellant.

Finally, Appellant wishes to correct the misapprehension of Appellee, that the *Spector* case is being relied on as au-

thority for the *nature* and *scope* of the Virginia tax. This is not the case. Appellant relies on the *Spector* case as controlling because the Virginia tax is an *excise* or *privilege* tax in its effect, regardless of the name by which it is called.

V.

Conclusion

It is respectfully submitted that § 58-547 of the Code of Virginia, 1950, as applied to Appellant is in its ultimate effect a direct tax on the privilege of engaging in interstate commerce and as such violates the Commerce Clause of the Constitution of the United States and therefore the judgment of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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January 4, 1954

JUL 6 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, files this statement in opposition to the appellant's statement as to jurisdiction. The appellee includes herein its motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the question raised on behalf of the appellant is so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

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I

The State Statute Involved and the Nature of the Case

A. The Statute

The appellant contends that Section 58-547 of the Code of Virginia, which authorizes the levying of a tax based on the gross receipts of express companies, is invalid under the Commerce Clause of the Constitution of the United States. This section is found in Article 4 of Chapter 12, Title 58, of the Code of Virginia, which deals with the taxation of "Public Service Corporations." It reads as follows:

> "Every such company, for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:
>
> "The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.
>
> "The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

B. The Proceedings Below

This case involves two applications of the Railway Express Agency, Incorporated, filed pursuant to Section 58-

1122, and other provisions of the Code of Virginia, for correction of assessments of certain taxes for the years 1950 and 1951 made by the State Corporation Commission of Virginia in accordance with Section 58-547 of the Code of Virginia, and for refund of such taxes. The State Corporation Commission denied the refunds by orders entered on June 16, 1952, and from those orders the appellant appealed as a matter of right to the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals of Virginia in its opinion, dated March 9, 1953 and reported in 194 Va. 757 (Ad. Sheets, No. 7), held that the tax in question was an intangible property tax and did not violate either the Commerce Clause of the United States Constitution or section 171 of the Constitution of Virginia.

C. Statement of the Case

The appellant is a Delaware corporation, engaged in interstate commerce, and its first application for tax refund involved an assessment of $70,665.68, which was based upon gross receipts earned by it in the year 1949. The second application involved an assessment in the amount of $66,454.71, which represented the 1951 tax based on gross receipts earned by the appellant during the year 1950.

The appellant is engaged in the handling and transportation of goods, wares, etc. in express service in only interstate commerce in the State of Virginia, its intrastate business in this State being carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated of Virginia.

D. The Question Presented

Does the tax imposed by Section 58-547 of the Code of Virginia violate the Commerce Clause of the United States Constitution?

II

ARGUMENT

A. The Tax Involved in This Case Is a Property Tax Thus Making It Clear That No Substantial Federal Question Is Presented.

The appellant points to the decision of the Supreme Court of Appeals of West Virginia in the case of *American Barge Line Co.* v. *Koontz,* — W. Va. —, 68 S. E. (2d) 56 in an attempt to demonstrate the importance of the question here presented. However, it fails to point out in what ways that decision is the "reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at Bar."

The case of *American Barge Line Co.* v. *Koontz, supra,* is not in conflict. The Supreme Court of Appeals of West Virginia expressly recognized the fact that water carriers operating under license of the Federal government may well be validly assessed with State taxes, and simply held that (1) there was no taxable incident under the facts presented to afford a basis for the tax, and (2) the tax imposed on the interstate business was a "privilege" tax.

The tax under consideration here is a property tax and the appellant is not alone when it pays to the locality taxes on tangible personal property and pays to the State taxes on intangible personal property and money as well as the taxes measured by gross receipts. See Chapter 12, of Title 58 of the Code of Virginia, and especially, Article 2, Railway and Canal Companies; Article 7, Steamship and Other Water Carriers; Article 8, Telephone Companies; Article 10, Water or Heat, Light and Power Companies; and Article 14, Motor Vehicle Transportation Companies in Cities and Towns.

An examination of the Articles mentioned above clearly shows that the State Legislature has established a pattern

for the taxation of certain public service corporations. The Legislature, in its wisdom, chose to label the tax on gross receipts a "State franchise tax" in some instances (see Articles 2 and 10) and a "license tax" in other instances (see Articles 7, 8 and 14), but regardless of the label the result is the same. Certain property, i. e., real estate and tangible personal property, has been segregated for local tax purposes and certain property, i. e., intangible personal property, money and the going concern value of real and tangible personal property based on gross receipts, has been set aside for State tax purposes.

As pointed out, Section 58-547 is found in Article 4, Chapter 12 of Title 58 of the Code of Virginia and Chapter 12 is entitled, "Public Service Corporations." In the case of *City of Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654, the court below, in an exhaustive and able opinion by the late Mr. Justice Staples, considered the constitutional and statutory provisions which govern the assessment of the properties of public service corporations. Such a consideration readily revealed that a uniform plan for the assessment and taxation of public service corporations had been evolved, and in this connection it was said:

> "* * * Since the existing method of assessing the properties of the appellee [power] company was developed from the system prescribed for assessing the properties of *railroad companies*, we will give our attention first to the origin and expansion of the constitutional and statutory provisions relating to the taxation of railroads." (188 Va. 613, 50 S. E. 2d) 660)."

This system of taxation was placed in the Virginia Constitution of 1902 and the framers thereof, in order to make sure that the railroad tax did not violate the Federal Constitution, copied the Maine tax that had been upheld

in the case of *Maine* v. *Grank Trunk Ry.*, 142 U. S. 217. See Constitutional Debates of Virginia, 1902, p. 2671. The tax was labeled a franchise tax, but the court below, speaking of a power company in the *City of Richmond* case, made it clear that the co-called franchise or license taxes levied on public service corporations were, in effect, property taxes.

It is clear, then, that there is no conflict in the decisions of the highest courts of Virginia and West Virginia. Furthermore, it is clear that the decision of the court below is not inconsistent with the decisions of this Court. See *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80; *Ott* v. *Mississippi Val. Barge Line Co.*, 336 U. S. 169; and *Canton R. Co.* v. *Rogan*, 340 U. S. 511. Compare *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, wherein a Connecticut statute was declared to be invalid because the highest court of the State had determined that it imposed an "excise" tax.

There is absolutely no justification for the charge that "the Supreme Court of Appeals of Virginia undertook to avoid the consequences of that decision [*Spector* case] by attributing to §58-547 the label of a property tax." (Appellant's Statement as to Jurisdiction, p. 8). The case of *City of Richmond* v. *Commonwealth, supra*, was handed down in 1948 and, as already pointed out, the Supreme Court of Appeals of Virginia made it clear that the so-called license taxes levied on all public service corporations in this State were not excise or privilege taxes but property taxes. See, also, *Commonwealth* v. *Balto. Steam Packet Co.*, 193 Va. 55, at pp. 69 and 70. The *Spector* case, *supra*, was not decided by this Court until March 26, 1951.

The appellee agrees that it is well settled that the operation of the statute and not its legislative label is what gov-

erns the nature of a tax. However, the Supreme Court of Appeals of Virginia has already cast aside descriptive labels and has determined that the instant tax is an intangible property tax. It has carefully reviewed the legislative and administrative history of Section 58-547 and related statutes and has concluded:

> "* * * Like the tax imposed by Code, §58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas,* 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031; *Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. (2d) 654." (*Railway Express Agency* v. *Commonwealth,* 194 Va. at p. 761).

Under such circumstances this Court will not upset the construction given, since there is no showing of an evasion for the purpose of avoiding a contrary ruling under the decisions of this Court. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.*, 332 U. S. 495, 499, and *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 512.

Finally, it should be pointed out that the decision of the Supreme Court of Appeals of Virginia in the case of *Commonwealth* v. *Balto. Steam Packet Co., supra,* appeal dismissed, 343 U. S. 923, did not rest upon the fact that the taxpayers were not engaged *exclusively* in interstate commerce. Rather, the decision rested, as it does here, on the ground that the statute authorized the levying of a property tax. Furthermore, the *alleged* conflict between decisions

of the highest courts of Virginia and West Virginia existed and was pointed out to this Court by the appellants in the *Balto. Steam Packet Co.* case. Therefore, the same conditions exist now as existed when this Court dismissed the appeal in the *Balto. Steam Packet Co.* case for lack of a substantial federal question.

III

Conclusion

Wherefore, the appellee respectfully submits this statement showing that the question upon which the decision of this case depends is so unsubstantial as not to need further argument, and the appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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HAROLD B. WILLEY,

Supreme Court of the United States

October Term, 1953

No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
Appellant

v.

COMMONWEALTH OF VIRGINIA
Appellee

Appeal from the Supreme Court of Appeals of Virginia

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is officially reported in Volume 194 of the Virginia Reports at page 757, and is also reported in Volume 75 of the Southeastern Reporter, 2nd Series, page 263. For text of the opinion, see page 48 of the printed transcript of record. The opinion of the State Corporation Commission has not yet been officially reported. For text of the opinion, see page 22 of the printed transcript of record.

GROUNDS OF JURISDICTION

The Appellants challenge the validity of § 58-547 of the Code of Virginia, 1950, alleging it is repugnant to the

Commerce Clause of the Federal Constitution. The appeal is pursuant to §1257(2) of Title 28 of the United States Code.

THE QUESTION PRESENTED

By this appeal the following question is presented:

1. Whether §58-547 of the Code of Virginia, 1950, imposes an *ad valorem* property tax on the value of the Corporation's property as a "going concern" as the State Corporation Commission and the Supreme Court of Appeals of Virginia have held or whether the section imposes a license tax which amounts to an unconstitutional regulation of interstate commerce.

STATEMENT OF THE CASE

A.

Preliminary Statement

This case is an appeal from the judgment of the Supreme Court of Appeals of Virginia affirming an order of the State Corporation Commission entered June 16, 1952, which order denied to the Appellants refund of certain taxes for the years 1950 and 1951. The taxes in question were assessed by the State Corporation Commission under the provisions of §58-547 of the Code of Virginia, 1950.

B.

The Case

Appellant, a Delaware corporation, operates interstate between all the forty-eight states of the United States and the District of Columbia and operates intrastate within all of the states except Virginia. The business of Appellant in Virginia has been confined solely to interstate business since the State Corporation Commission denied it authority to do an intrastate business by order dated April 8, 1929, in

Case No. 3900, reported at page 252 of the annual report of the Commission for 1929. This decision was sustained by the Supreme Court of Appeals of Virginia, 153 Va. 498, 150 S. E. 419 (1929), and by this Court, 282 U. S. 440 (1931). Following that decision, Appellant organized in Virginia a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting an express transportation business in intrastate commerce in that state.

Since its organization, the Virginia Company has done exclusively an intrastate business in Virginia and has reported to the State of Virginia, has been assessed with and has paid annually all taxes on property owned by it and money used and employed by it as well as the tax imposed under § 58-547, based on its total gross receipts each year (R. 15, 45).

Since the organization of its Virginia subsidiary, Appellant has made the requisite reports to the State of Virginia, has been assessed with and has paid annually all taxes on property and money used by it in Virginia all of which was used by it exclusively in interstate commerce and, under protest, it has likewise made the requisite report, has been assessed with and has paid annually the tax imposed under § 58-547. Although this tax ostensibly has been assessed pursuant to § 58-547 or its antecedent sections of the Virginia Code which requires an apportionment of its total gross receipts, the amount of tax has been determined pursuant to informal understandings resulting from discussions with representatives of the State Corporation Commission.

The amounts of the various assessments annually made against Appellant since 1942 pursuant to this understanding have been accepted by the company and the tax paid thereon pursuant thereto under protest.

Following the decision in the *Spector case,* 340 U. S. 602 (1951), Appellant, by formal petitions filed with the Virginia State Corporation Commission, sought refunds for the taxes paid pursuant to § 58-547 for the years 1950 and 1951 in the amount of $70,665.68, and $66,454.71, respectively (R. 2, 6).

These petitions for refund raised the single question of the repugnancy of § 58-547 to the Commerce Clause of the Constitution of the United States by alleging that the license tax imposed by § 58-547 was "unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to do an interstate business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provision of Article I, Section 8, Paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States."

The Commission heard the petitions together and dismissed the 1950 petition on a jurisdictional point not pertinent to this appeal. With respect to the 1951 petition, it held that § 58-547 was a property tax on the intangible elements of value generated by the employment in business of the physical properties of express companies in the State and not a license or excise tax and was, therefore, not violative of the Commerce Clause of the Constitution of the United States when applied to Appellant, although engaged solely in interstate commerce in Virginia (R. 21, 31).

The decisions of the Commission on both petitions were appealed to the Supreme Court of Appeals of Virginia on a consolidated record.

The Virginia Court held that § 58-547 as applied to Appellant was not repugnant to the Commerce Clause of the

Federal Constitution since it was not a tax on the privilege of conducting an express business in Virginia but was a property tax levied on the element of value of Appellant's physical properties created by their employment in business in interstate commerce in Virginia (R. 51). The court's decision was applicable to the petitions for refund for both 1950 and 1951, rendering unnecessary a decision on the jurisdictional question upon which the Commission based its adverse decision on the petition for the 1950 refund.

Appellant is appealing from the decision of the Virginia Court on the constitutional question stated above.

OUTLINE OF ARGUMENT

Part one of the Argument is devoted to calling to the Court's attention the fact that, while it undoubtedly can inquire for itself as to the nature and effect of the tax in question, in view of the history of decisions in Virginia there is no occasion for this Court to disturb the ruling of the Virginia Court.

Part two deals with whether the tax in question is a property tax.

Properly apportioned gross receipts may be used as a measure of the going concern value of the property within a state engaged in interstate commerce. The prior decisions of the Supreme Court of Appeals of Virginia are uniformly to the effect that the nature and effect of such taxes in Virginia are that of an *ad valorem* property tax on going concern value. These rulings are justified both by the administrative interpretations and the obvious intention of the framers of the Virginia Constitution of 1902.

The tax in question is clearly not a license tax as it is not made a condition precedent to the doing of business in Virginia. The tax meets the tests laid down by this Court in that it is a part of a system established for taxing all of the

property of such corporations, it is the only tax levied on the going concern value, there is no possibility of multiplicity of taxation by the several states, and it is in lieu of other taxes. The tax is supported by *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80, and the case is clearly distinguishable from *Spector Motor Service Inc.* v. *O'Connor, supra.*

ARGUMENT

I.

Should This Court Re-examine the Virginia Decisions?

The Appellee recognizes the power of this Court to determine for itself the nature and effect of a tax of the type here under consideration, but the Court is bound by the construction given to state statutes by state courts. *Aero Mayflower Transit Co.* v. *Board of R. R. Commrs.,* 332 U. S. 495.

As will be developed later in the brief the Virginia Court determined the type of tax here in question to be a property tax in a case in which the *operation* of the tax was involved and where the constitutionality of the tax was not an issue. Under such circumstances this Court should not disturb the ruling of the lower court. It is one thing for this Court to ignore the *labels* applied by state courts, as was the case in each of the decisions cited by the Appellant, it is quite another for the Court to look behind the state court's decision as to the operation of the statute at the state level. The Virginia Court in *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948), was not concerned with a constitutional question but was seeking to determine whether the locality could tax the property of a public service corporation at 100% of its actual value. The Court clearly determined that it could not do so and that the "going concern value" was the subject of the gross receipts tax. Since

it was the *operation* of the statute at the state level that was determined there, and since that operation makes this a property tax, it would appear that there is no occasion for this Court to disturb the finding of the Virginia Court.

II.

Section 58-547 Imposes a Property Tax on the Going Concern Value

A.

PROPERLY APPORTIONED GROSS RECEIPTS MAY BE MADE THE MEASURE OF GOING CONCERN VALUE

The Appellant contends that the "basic error" of the Virginia Court was its failure to recognize that a tax measured by gross receipts cannot measure the going concern value but that such could only be measured by a tax upon net profits (Brief of Appellant, p. 31).

We do not so understand the decisions of this Court. In the case of *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), it is true, that the Court discussed the significant difference between a tax measured by gross receipts and one measured by net income. But it did so merely to point out that the latter did not have the tendency to discourage interstate commerce which might be present in the former. *The Court did not hold nor indicate that an ad valorem property tax measured by fairly apportioned gross receipts is invalid.* Indeed, this Court has repeatedly expressed itself to the contrary. In *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250 (1938), the Court, speaking through Mr. Justice Stone, said:

> "* * * Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; Maine v. Grand

Trunk Railway, supra; Cudahy Packing Co. v. Minnesota, supra; United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, Fargo v. Michigan, supra; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., supra, with which compare Wisconsin & M. R. Co. v. Powers, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in Maine v. Grand Trunk Railway, supra; Ficklen v. Shelby County Taxing District, supra; American Manufacturing Company v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, Cudahy Packing Co. v. Minnesota, supra; United States Express Company v. Minnesota, supra; cf. Postal Telegraph Cable Co. v. Adams, supra; see McHenry v. Alford, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. * * * ." (303 U. S. 256)

As recently as the case of *Interstate Oil Pipe Line Company* v. *Stone*, 337 U. S. 662 (1949), this Court has approved the doctrine of *Maine* v. *Grank Trunk R. Co.*, 142 U. S. 217 (1891), which sustained a tax on an interstate railroad corporation which was "an annual excise tax measured by apportioned gross receipts for the privilege of exercising its franchises in this State" (337 U. S. 667).

Indeed, Mr. Justice Burton in the case of *Spector Motor Service, Inc.* v. *O'Connor, supra,* which is after all the case upon which the Appellant ultimately rests its case, felt it

necessary to point out that the decision of the Connecticut Court took the *Spector Case* outside the realm of decisions such as the *Interstate Case* of 1949, *supra* (340 U. S. 607).

Accordingly, it seems clear that the fact that the tax here involved is measured by apportioned gross receipts does not *per se* make it impossible to classify this tax as a property tax as the Appellant contends it does.

B.

THE HISTORY OF DECISIONS IN VIRGINIA

It is apparent from the brief of the Appellant that they regard the gross receipts taxes on railroad and steamships in Virginia as being so similar to the tax in question as to make administrative practices and judicial rulings with respect to such taxes applicable to this tax. We should, therefore, examine those rulings and decisions, for assuming *arguendo* that this Court will examine for itself the nature and effect of the tax here involved, as the Appellant urges, we take it that this Court will give no more, if not less, significance to the label given the tax by the Legislature than it will to the judicial determination of the nature and effect of the tax made by the highest court of the State. Indeed, in the *Spector Case, supra,* this Court accepted without question the construction placed on the tax by the Connecticut Court.

The Appellant has charged the Supreme Court of Appeals of Virginia with laying "the ground work for sustaining the gross receipts tax against the Appellant by assigning as an alternate ground for its decision [in *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137] that the tax was levied on the augmentation in value of the physical assets of the taxpayer in Virginia resulting from their use as part of a going business" (Brief of Appellant,

p. 32). And further charges that the Virginia Court gave this tax a new form "merely to avoid" an adverse economic consequence to the Commonwealth and characterized the tax as a property tax "at such a late hour in the shadow of *Spector Motor Service Inc., supra*" in "an obvious resort to form." These charges are groundless.

1.

City of Richmond v. Commonwealth (1948)

The first time that a tax of this type was before the Supreme Court of Appeals of Virginia for a decision as to its nature or form was in the case of *City of Richmond* v. *Commonwealth,* 188 Va. 600, 50 S. E. 2d 654 (1948). That decision, *coming before the Spector Case had been heard of in Virginia,* clearly establishes the fact that, under our system of taxation, the localities tax the "bare bones" of the property and the Commonwealth, by means of a tax labeled a franchise tax and measured by apportioned gross receipts, reaches the "going concern" value of the property. This the Court explained by quoting from the views of two former State Corporation Commissioners.

> " '* * * It will be noted that in assessing these properties the Commission is expressly forbidden by the Constitution to include any franchise value in the assessment of the physical properties for taxation. * * *' " (188 Va. 632)
>
> * * *
>
> " 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company *exclusive of any franchise value, good will, "going concern value,"*

"cost of establishing the business," or other "intangible value of the company." ' " (Italics supplied). (188 Va. 624)

" '* * * In brief, the plan existing today, which is common to all such companies, provides for the imposition of *ad valorem* taxes by the several localities in the State upon the tangible properties of such companies. These taxes are imposed on the basis of assessments made or valuations fixed by the Commission. A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exclude* such franchise value as may be inherent in such property.' " (188 Va. 619)

This decision make it clear that: (1) the Supreme Court of Appeals of Virginia in the *Baltimore Steam Packet Case, supra,* was not classifying the tax in order to avoid the *Spector Case;*

(2) The "going concern value" of the corporation is not subjected to dual taxation;

(3) The system of taxation established by the Legislature under the Constitution of 1902 was designed to levy a tax on the "going concern value" of the corporation measured by its gross receipts; and

(4) The words "franchise tax" or "license tax" refer to a tax on the "going concern value" for the Court used the words "franchise value" when speaking of the "going concern value" of such corporation.

2.

Virginia Electric & Power Co. v. Commonwealth (1940)

In making its charges against the Supreme Court of Appeals of Virginia the Appellant did not see fit to call to the Court's attention the *City of Richmond Case* in spite of the fact that counsel for the Appellant were in that case allied with the Commonwealth against the position taken by the City. Instead, the Appellant asserts that "in at least one case the Virginia Court has held that the railway gross receipts tax is a *franchise tax* as distinguished from a tax on the property used to produce those gross receipts" (Appellant's Brief, p. 24). As authority they cite *Virginia Electric & Power Co.* v. *Commonwealth*, 174 Va. 316, 6 S. E. 2d 680 (1940). The point involved in that case was whether the receipts from operation of buses were a part of the gross transportation receipts taxed by the statute. The Court was not considering the *nature* or *effect* of the tax but rather was considering the *scope* of the term "gross transportation receipts." The question of whether the tax was a license or franchise tax or an *ad valorem* property tax was not before the Court. It is, therefore, *unsound* to say that the Court held that tax to be a franchise tax as distinguished from a property tax. The Court had no occasion to draw any distinction.

3.

Commonwealth v. Baltimore Steam Packet Co. (1951)

The case of *Commonwealth* v. *Baltimore Steam Packet Co., supra,* was so clearly analogous to the instant case that the appellant here filed a brief *amicus curiae* in that case.

After reviewing the principles laid down by this Court with respect to such taxes the Virginia Court considered the question of whether that tax (and, since the Appellant was

before the Court *amicus curiae* the Court also expressly dealt with the tax on express companies) was a license tax and concluded:

> "Certainly section 58-575 does not impose a license tax in the sense that its payment is a prerequisite to the right to operate vessels in the navigable waters of the United States. It does not impose a tax on the privilege of navigation. The payment of the tax is not made a condition precedent to the right to carry on the business, as was the case in *Moran* v. *New Orleans*, 112 U. S. 69, 5 S. Ct. 38, 28 L. ed. 653, and *Harman* v. *Chicago*, 147 U. S. 396, 13 S. Ct. 306, 37 L. ed. 216. It provides no criminal sanctions, but its enforcement is left to the ordinary means devised for the collection of taxes. *Postal Tel. Cable Co.* v. *Adams, supra.*
>
> "Baltimore has been paying a tax on receipts from business 'beginning and ending in Virginia' every year since 1915, but no license has ever been issued to it and the procedures prescribed in Article I, Chapter 7 of Title 58 for obtaining licenses have not been followed. 'But where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.' *Charlottesville* v. *Marks' Shows, supra*, 179 Va. at p. 329, 18 S. E. (2d) at p. 894.
>
> "If not a license tax, is it a tax on property or the equivalent of a tax on property?" (193 Va. 68)

Turning its attention to its own question the Court said:

> "In *Richmond* v. *Commonwealth*, 188 Va. 600, 619, 50 S. E. (2d) 654, 663, the opinion of the State Corporation Commission in that case is quoted to the effect that our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of public service corporations, common to all such companies, and providing for the imposition of *ad valorem*

taxes by the several localities in the State, on the basis of assessments or valuations fixed by the Commission. 'A second and integral part of the system provides that such companies shall pay a franchise tax measured by gross receipts which tax is devoted to the support of the State government. The constitutional and statutory provisions, providing for this dual method of taxing such companies, uniformly require that the Commission, in making the assessments or fixing the valuations of the tangible properties, must *exlude* such franchise value as may be inherent in such property.'

"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

" 'The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good-will, "going concern value," "cost of establishing the business," or other "intangible" value of the company.'

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

" 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare bones,' to be taxed by the locality, and the live, or

going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause." (193 Va. p. 69)

C.

THE ADMINISTRATIVE INTERPRETATION IN VIRGINIA

As has been previously demonstrated, both the State Corporation Commission (see statement of former Commissioner Epes quoted in *Baltimore Steam Packet Case, supra*) and the Supreme Court of Appeals of Virginia (188 Va. 619) have interpreted the Virginia statutes to mean that the property tax reserved to the localities must be valued with "franchise value" or "going concern value" excluded. It is clear then that this element of value in the Appellant's property is not taxed under the administrative interpretation of the statute unless it is taxed by the gross receipts tax.

Further evidence of the administrative understanding is found in the 1941 Annual Report of the State Corporation Commission where it is said:

> " 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property, denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.' " (193 Va. 70)

D.

THE INTENTION OF THE CONSTITUTION OF 1902

The Appellant also contends that the tax here under consideration must be regarded as an excise tax because of its similarity to the "franchise taxes" imposed on railroads. They reason that the railroad provisions were copied by the framers of the Constitution of 1902 from the Maine statute in the light of the construction placed by this Court on that statute in *Maine* v. *Grand Trunk Railway Co., supra.* They urge, therefore, that the framers of the Constitution intended not a property tax but an excise tax.

In *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217 (1908), Mr. Justice Holmes discussed the *Grand Trunk Case* and said:

> "* * * This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District, 145 U. S. 1, 23, 36 L. ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 697, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Mc-

Henry v. Alford, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 18 Sup. Ct. Rep. 242.

" 'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent thereto, it is not open to attack as inconsistent with the Constitution.' Postal Teleg. Cable Co. v. Adams, supra. See New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439, 39 L. ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. * * *" (28 S. Ct. 640)

We agree with the Appellant's view that our system of taxation is based on the *Grand Trunk* decision. But it is based on the interpretation placed on that decision by the *Galveston Case* that the tax imposed is a tax on the property of companies engaged in commerce. Our tax fits the pattern which Mr. Justice Holmes described in the *Galveston Case* in these words:

"* * * As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. * * *." (29 S. Ct. 639)

Nor is this a new or revised theory. The Appellant could, of course, reply that, the *Galveston Case* having been decided in 1908, it is absurd for us to urge that the framers of our Constitution have followed that interpretation of the *Grand Trunk Case*, however, it is clear that the construction placed by them on *Grand Trunk* is identical with that placed on the case by Mr. Justice Holmes six years later.

The spokesman for the committee that drafted the provision had this to say:

> "It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"
>
> * * *
>
> "I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will." (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2857).

It is also clear from this same gentleman's debate on the railroad taxes that he considered that the only way to reach the "going concern value" was through a gross receipts tax, for he said:

"As I have said, we looked around to see if we could find a principle that would do justice, and in looking around we found *that as we could not find out the material value of this property, like you find out the value of a house, we would provide for some method of estimating it, and we would leave it to the State authorities to exercise it.* We found that if we take the property at its present value, if you do not increase the assessed value of their real estate and tangible personal property one dollar, but add to it the proposed tax of one per cent, upon the gross receipts, the franchise tax, you will get in the case of the Chesapeake and Ohio road 3.31 per cent, of their gross earnings, or about three and a third per cent. In the case of the Norfolk and Western you will get 3.37 per cent, or about three and a third per cent. In the case of the Southern you will get 3.97 per cent, or, in round numbers, four per cent of their gross earnings. In the case of the Seaboard Air Line you will get 5.32 or about five and a third per cent; and as to the Atlantic Coast Line you will get 6.75 per cent of their gross earnings. We think gentlemen, that we have shown no favortism.

* * *

"I repeat that you cannot get at the value of this property like you can get at the value of my real estate. There is but one way of looking at my real estate, and that is to see what its market value is. *But you cannot ascertain the market value of a railroad bed. We could not apply, therefore, the principle that you would apply to the ordinary classes of property owned by individuals.* (Italics supplied) (Debate of the Constitutional Convention of Virginia, 1901-2, II, p. 2677).

Further, and direct, evidence of the intention and understanding of the framers of the Constitution of 1902 is found in § 170 of the Constitution. The pertinent portion of that section reads as follows:

> "The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial or commercial corporation."

The use of the word "other" in this section is clear and unmistakable evidence that the framers of the Constitution understood a franchise tax to be a tax on the franchise value or the increased value of property because of its employment in commerce.

Likewise §§ 176 and 177 of the Constitution clearly indicate that the gross receipts tax is a tax on the property value of the franchise. Those sections are set forth in the Appendix to this brief in both their original and amended form.

Section 176 provides that the State Corporation Commission shall ascertain and assess the "value of the road bed and other real estate, rolling stock, and all other personal property whatsoever (except its franchise * * *)" in this State of each railway corporation. There follows a similar provision, including the *exception as to franchise*, regarding canal corporations. Here again the framers of the Constitution clearly regarded the franchise as property. Section 177 provides for a "francise tax" upon the gross receipts of such corporations "in lieu of all other taxes or license charges whatsoever upon the franchise." These two sections make it abundantly plain that the tax is directed at the property which is inherent in the franchise and demonstrate without doubt the constitutional understanding and intention to lay a tax on the going concern value.

E.

THE OPERATION OF THE STATUTE AS COMPARED WITH DECISIONS OF THIS COURT

In determining whether this is a license tax or a property tax it would seem that it would be helpful to examine the operation of the statute in the light of certain of the decisions of this Court just as the Virginia Court did in the *Baltimore Steam Packet Case.*

The tax in question is not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means devised for the collection of taxes (See § 58-554, at page 42 of Appellant's brief). The tax, therefore, meets the test of *Postal Tele. Cable Co.* v. *Adams,* 155 U. S. 688.

The important element of *Maine* v. *Grand Trunk Ry. Co., supra,* as referred to in the *Galveston Case, supra,* was:

> "* * * the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. * * * ." (210 U. S. 226)

The tax in question is a part of an identical system. Indeed, Appellants argue that such taxes in Virginia copied that system.

The tax in the *Galveston Case* was condemned because it was an attempt to reach receipts reached by another tax on the property that included going concern value, but in *United States Exp. Co.* v. *Minnesota,* 223 U. S. 335, this Court sustained the tax because it was "the only mode pre-

scribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction."

The tax involved is the only tax in Virginia that reaches going concern value.

Other taxes have been condemned because they permitted the possibility of a cumulative burden by the imposition of a similar tax on the same property by numerous states. But when, as here, the tax is "fairly apportioned to its use within the state" that vice is not present. *Western Live Stock, supra.*

In *Joseph* v. *Carter, etc., Stevedoring Co.*, 330 U. S. 422, the important aspect was that it was a tax in lieu of property taxes. Section 58-553 makes it plain that the tax here involved is in lieu of other taxes. Indeed, Commissioner Catterall in the opinion of the State Corporation Commission points out that, by virtue of § 58-553, express companies escape tax on their rolling stock (R. 32).

In *Memphis Natural Gas Co.* v. *Stone, supra,* the Memphis Natural Gas Company, a Delaware corporation, owned and operated a pipe line which ran through Mississippi from and into other states. It did not engage in intrastate commerce in Mississippi. In addition to *ad valorem* taxes, Mississippi imposed "a franchise or excise tax" based on the value of the capital used, invested or employed within the State. The levy was sustained. The court said that the State court had construed the statute as an exaction required as a recompense for the State's protection of lawful activities, and those local incidents were not the "taxable events" selected for the imposition of the *ad valorem* tax. "These local incidents were the basis for the franchise or excise tax now in controversy. No reason is perceived why Mississippi cannot exact this different tax for the same protection. It is as though the *ad valorem* rate had been increased."

It is submitted that all of the reasons for sustaining the tax in the *Memphis Case* are present here.

Finally, it should be noted that the *Spector Case* is not in point here. In that case the court did not deal with the sole question presented by this case. In the *Spector Case* the Connecticut Court held the tax to be an excise tax. This Court did not inquire into the correctness of that ruling but decided the case on the basis of the tax being an excise tax. In other words, this Court started there with a fixed decision on the very question which it must determine here. The case is clearly no authority on the question of whether the Virginia tax is a property or an excise tax.

CONCLUSION

The history of administrative and judicial decisions in Virginia together with the obvious intention of its Constitution and the practical operation of its taxing statute are such that it is clear that the tax in question is a tax upon the increased value of the Appellant's property when viewed as a going concern. Such a tax is not in violation of the Commerce Clause.

For the foregoing reasons Appellee respectfully submits that the judgment appealed from should be affirmed.

Respectfully submitted,

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Sec. 176. Assessment and taxation of railroad and canal companies.

The State Corporation Commission shall annually ascertain and assess, at the time hereinafter mentioned, and in the manner required of the Board of Public Works, by the law in force on January the first, nineteen hundred and two, the value of the roadbed, and other real estate, rolling stock, and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each railway corporation, whatever its motive power, now or hereafter liable for taxation upon such property; the canal bed and other real estate, the boats and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each canal corporation, empowered to conduct transportation; and such property shall be taxed for state, county, city, town, and district purposes in the same manner as authorized by said law, at such rates of taxation as may be imposed by them, respectively, from time to time, upon the real estate and personal property of natural persons: provided, that no tax shall be laid upon the net income of such corporations.

Sec. 177. Franchise tax of railroad and canal companies.

Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual state franchise tax equal to one per centum upon the gross receipts hereinafter specified in section One Hundred and Seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section One Hundred and Seventy-six, shall be in lieu of all other taxes or license

charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section One Hundred and Seventy-six: provided, that nothing herein contained shall exempt such corporation from the annual fee required by section One Hundred and Fifty-seven of this Constitution, or from assessments for street and other public local improvements authorized by section One Hundred and Seventy; and provided, further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations.

Constitution of 1902 (Present Form)

Sec. 176. Assessment and taxation of railroad and canal companies.

The State Corporation Commission shall annually ascertain and assess, in the manner prescribed by law, the value of the roadbed and other real estate, rolling stock, and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each railway corporation, whatever its motive power; now or hereafter liable for taxation upon such property; the canal bed and other real estate, the boats and all other personal property whatsoever (except its franchise and the nontaxable shares of stock issued by other corporations) in this State, of each canal corporation, empowered to conduct transportation; and subject to such segregation of property, if any, as is provided in section one hundred and seventy-one of this Constitution, such property shall be taxed for State, county, city, town and district purposes in the manner prescribed by law, at such rates of taxation as may be imposed by them, respectively, from time

to time, upon the real estate and personal property of natural persons.

Sec. 177. Franchise tax of railroad and canal companies.

Every such railway or canal corporation shall also pay an annual State franchise tax to be prescribed by law upon the gross receipts hereinafter specified in section one hundred and seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section one hundred and seventy-six, shall be in lieu of all other taxes, or license charges whatsoever upon the franchise of such corporation, the shares of stock issued by it, or upon its property assessed under section one hundred and seventy-six; provided, that nothing herein contained shall exempt such corporation from the annual fee required by section one hundred and fifty-seven of this Constitution, or from assessments for street and other public improvements authorized by section one hundred and seventy; and provided, further, that nothing herein contained shall annul or interfere with or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations.

SUPREME COURT OF THE UNITED STATES

No. 163.—October Term, 1953.

Railway Express Agency, Incorporated, Appellant, *v.* Commonwealth of Virginia.	On Appeal From the Supreme Court of Appeals of Virginia.

[April 5, 1954.]

Mr. Justice Jackson delivered the opinion of the Court.

This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them.

In the 1920's the railroads of the country took over the express business theretofore separately handled. Their instrumentality was this appellant, a Delaware corporation, chartered for interstate and intrastate operation throughout the Union and actually so operating in every state except Virginia. It sought to do a general express business there, but that State has a constitutional provision which forbids a foreign corporation to exercise any public service powers or functions therein.[1] This prohibition was invoked by the State Corporation Commission [2] to deny appellant authority to do any intrastate business. This exclusion was sustained by Virginia's highest court [3] and by this Court.[4]

As a consequence of the State's own policy, this appellant does no business in Virginia which the State has

[1] Va. Const., Art. XII, § 163.

[2] Case No. 3900, Virginia Corporation Commission Report (1929), p. 252.

[3] *Railway Express Agency, Inc.* v. *Virginia ex rel. State Corporation Comm'n*, 153 Va. 498, 150 S. E. 419.

[4] 282 U. S. 440.

power to prohibit but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution. To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary necessarily was organized. That local company annually has been assessed and has paid the type of tax here in controversy, based upon its total gross receipts. Those payments are not before us.

Virginia provides by statute [5] a separate and detailed system of taxation for express companies. It allocates

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[5] The tax in question is laid under Va. Code, 1950, § 58-547. This section and the section immediately preceding it read as follows:

"§ 58-546. Taxes on property of express companies.—Each and every one of the express companies doing business in this State shall, on or before the first day of October of each and every year, pay to the State and to the several counties, cities and towns of the State wherein they may have taxable properties located, the taxes levied on such property as follows:

"(1) The State tax on the intangible personal property (other than shares of stock, and bonds issued by counties, cities and towns or other political subdivisions of this State) owned by every such company shall be at the rate of fifty cents on every one hundred dollars of the assessed value thereof;

"(2) The State tax on the money of every such company shall be twenty cents on every one hundred dollars of the assessed value thereof;

"(3) There shall be no local levies assessed on such intangible personal property or money;

"(4) On the real estate and tangible personal property of every such company there shall be local levies at the same rate or rates as are assessed upon other real estate and tangible personal property located in such localities, the proceeds of which local levies shall be applied as is provided by law.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law.

"§ 58-547. Annual license tax.—Every such company, for the privilege of doing business in this State, in addition to the annual regis-

to state taxation, free of all local levies, two kinds of property, *viz.*, intangible personal property and money. It sets off real estate and tangible personal property for local levies at the same rates as other similar properties. These, taxable at different rates, are all included in the statute under the rubric "Taxes on property of express companies." Then follows a section headed "Annual license tax" providing that "for the privilege of doing business in this State" express companies shall pay "in addition to . . . the property tax as herein provided" an "annual license tax" upon gross receipts earned in the State "on business passing through, into or out of this State."

Appellant has protested the gross receipts tax, and for some years the protesting company and the state authorities appear to have come together on a compromise formula, as to the portion of receipts attributable to Virginia, the details of which need not concern us, since it does not affect the issue of power now adequately raised, passed upon by the State Corporation Commission and the Supreme Court of Appeals and duly brought before us.

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tration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law."

Since admittedly the State did not grant any privilege but on the contrary denied every privilege in its power to withhold, and since it concedes that appellant does nothing within the State except interstate commerce, appellant contends that the assessment is invalid for contravention of the Commerce Clause of the Federal Constitution.

The State counters with the contention that we should regard this, not as a privilege tax, even though it was labeled as such by the statute imposing it, but, instead, as a property tax measured by gross income and laid on the intangible value of good-will or going-concern status. The Corporation Commission said that the physical properties were assessed at dead value or bare-bones value for local taxation, while here the "live or going concern value" is being separately taxed by the State "for the protection and services rendered by it." The State's highest court approved. While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going-concern value, and prohibited taxation of gross receipts from interstate commerce, "neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect," *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227, in which inquiry "we are concerned only with its practical operation." *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444.

We start with the taxing statute, in which the Legislature gave a trinity of characterizations to the tax. It was declared to be in addition to the "property tax," not an additional property tax; it was named "an annual license tax," and it was laid "for the privilege of doing

business in this State." It is not an easy conclusion that the Legislature did not know the actual character of the tax it was laying or that it misconceived what it was taxing. If the tax was in purpose and effect one on property, tangible or intangible, no reason is apparent for casting it in the mold of a privilege tax. Indeed, as the Corporation Commission finally said, the opposite is true, and some other basis for the tax must be found if it is to be saved as valid. This both the Commission and the court below sought to do.

The Virginia court, in this and earlier cases, considered that gross earnings measure the value of a good-will or going-concern element which is a separate intangible property of the company.

Of course, we have held, and it is but common sense to hold, that a physical asset may fluctuate in value according to the income it can be made to produce. A live horse is worth more than a dead one, though the physical object may be the same, and a smooth-going automobile is worth more than an unassembled collection of all its parts. The physical facilities used in carrying on a prosperous business are worth more than the same assets in bankruptcy liquidation or on sale by the sheriff. No one denies the right of the State, when assessing tangible property, to use any fair formula which will give effect to the intangible factors which influence real values. *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185. But Virginia has not done this.

Instead, the practical effect of the tax conforms to its statutory description as one whose impact is squarely upon gross receipts without consideration of their effect on the value of any of the classes of property recognized elsewhere in the statute. A summary of appellant's total

taxation for 1951 will illustrate this point.[6] It reported money on deposit in Virginia of $109,906.38, on which it paid a tax of $219.81 at the rate of twenty cents per $100. We may drop this item from consideration of additional going-concern value, for money is money and is a medium of exchange which does not deflate or inflate according to the owner's use of it. A dollar to an express company is worth as much and no more than a dollar to one of its employees. But this company had real property and tangible personal property, items no doubt possessing a going-concern as well as an intrinsic value. These properties were assessed at $129,279, on which it paid taxes of $3,389.65 at local rates, probably varied but averaging 2.6 per centum.

Appellant's tax, under the questioned portion of the statute, amounted to $66,454.71, so that its *tax* on a gross-

[6] The figures discussed in the text are summarized in the following chart for the year 1951.

Types of Property Taxed	Statutory Tax Rate	Assessed Value of Appellant's Property	Taxes Paid by Appellant
1. Intangible personal property.	50¢ on every $100	Unknown ($13,290,942.00 if disputed tax is intangible property tax)	Unknown ($66,454.71 if disputed tax is intangible property tax).
2. Money	20¢ on every $100	$109,906.38	$219.81
3. Real estate and tangible personal property	Local levies (average of 2.6 per centum)	$129,279.00	$3,389.65.
4. Gross receipts	2⅗ per centum	$3,090,916.55	$66,454.71.

receipts basis was over fifty percent of the *total value* of its real and tangible personal property. It is this tax which Virginia says is really a tax on the intangible value of this tangible property.

Neither the state court nor the Commission has seen fit to state any amount which it considers to be the going-concern valuation. We know the amount of the tax, and we know the rates of taxation, and from that can compute a possible valuation base. If this going-concern value be treated as separable "intangible property," the statutory rate is fifty cents per $100, at which rate tangible property worth only $129,279 must be deemed to have an intangible going-concern value of $13,290,942. In other words, every dollar invested in the tangible property of an express business is deemed worth over $100 for tax purposes. This may not overtax the express company, but it does overtax our credulity, and neither the court nor the Commission, while treating this as an intangible, expressly treated it as entitled to the intangible property rate or classification.

But the $66,454.71 of tax and the statutory gross-earnings tax rate of 2 3/20 per centum produce a base of $3,090,916.55, which is exactly the amount of gross revenues reported by appellant. To ascribe a going-concern value of over three million dollars to tangible property of $129,279 is on its face an extreme attribution. To base the value on appellant's gross revenues is to assume that every dollar of annual intake adds a dollar of intangible value to the company's assets regardless of how much it cost in labor, interest and other expense, including other taxes, to produce it. On the other hand, as a forthright tax on gross receipts, the tax involves no irrational or impractical assumption.

We have sustained and would now sustain the power of a state to tax, without discrimination, all property within its jurisdiction and to include in its assessment,

or to assess separately, the value added by the property's assemblage into a going business, even if that business be solely interstate commerce. Cf. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Baker* v. *Druesedow*, 263 U. S. 137; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185. The impact of the tax is thus upon the proportionate total worth of the property. But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local, physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. Cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328–329.

Here the State excises every receipt from movement of express in interstate commerce. It takes a portion of gross revenue from "all receipts earned in this State on business passing through, into or out of this State." It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nation-wide business is vulnerable to a gross revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden.

It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157; *New Jersey Bell Telephone Co.* v. *State Board*, 280 U. S. 338.

The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in *Baltimore Steam Packet Co.* v. *Virginia*, 343 U. S. 923, and *Norfolk, Baltimore & Carolina Line* v. *Virginia*, 343 U. S. 923, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. *Virginia* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. 2d 137.[7] But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from *Spector Motor Service, Inc.* v. *O'Connor*,

[7] The Corporation Commission commented on the *Baltimore Steam Packet* case in this manner: "So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved." Cases Nos. 10,629 and 10,767, Virginia Corporation Commission Report (1952).

supra. Those appeals did not question the fairness of apportionment of revenues between the interstate and intrastate business so as to require such consideration as we gave in *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653. It was therefore a mistake to assume that this Court, by dismissal of the appeals, approved the holding of the Virginia court that this statute imposes what in reality is a property tax though otherwise named and shaped.

We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business.

The judgment is reversed and the cause remanded for any further proceeding not inconsistent herewith.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 163.—October Term, 1953.

Railway Express Agency, Incorporated, Appellant, *v.* Commonwealth of Virginia. } On Appeal From the Supreme Court of Appeals of Virginia.

[April 5, 1954.]

Mr. Justice Clark, whom The Chief Justice, Mr. Justice Black and Mr. Justice Douglas join, dissenting.

The tax in question is nondiscriminatory, fairly apportioned, and not excessive. That much is conceded by appellant. Whatever the Court's mathematics may prove, it does not establish that the tax is unfair in any respect. In *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 610–615 (1951), I reasoned that a state tax with such attributes may properly be levied against a corporation which obviously could not engage in interstate commerce in the state without using the facilities and services of the state. I would uphold the tax here on the same grounds. But even accepting the Court's approach in *Spector*, the instant tax is valid.

Spector held that a state tax imposed on a foreign corporation engaged solely in interstate commerce for "the privilege of carrying on or doing business in the state" violates the Commerce Clause of the United States Constitution. The "operating incidence" of the tax—"the privilege of carrying on or doing business in the state"—was determined by the state court and not questioned by this Court. That label formed the nub of the Court's rationale in striking down the tax. That decision did not purport to cover a tax bearing a different name. In fact, the Court there specifically noted that the tax was *not* "collected in lieu of an ad valorem property tax";

presumably had such been the case the tax would have been upheld. *Id.*, at 607.

The Supreme Court of Appeals of Virginia has held that the instant tax is an ad valorem tax on intangible property; the "operating incidence" of the tax has been labeled the "going concern" value of appellant's physical assets in Virginia. The state court specifically held that the tax "is not a tax upon the privilege of carrying on a business exclusively interstate in character . . . ." 194 Va. 757, 760–761. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under *Spector*.

This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same "privilege" label that condemned the tax in *Spector*. Although the Court refused to pierce the label in *Spector*, I do not dispute its right to reexamine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating *Spector*. *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55 (1951), appeal dismissed, 343 U. S. 923 (1952); *City of Richmond* v. *Commonwealth*, 188 Va. 600 (1948). Moreover, this Court does not question the existence of a going concern value aside from the value of a business unit's physical assets. Nor does appellant; in its brief appellant "freely admits that a going business, if oper-

ated at a profit or if there is a reasonable expectation of earning a profit on future operations, may have a going concern or what is sometimes called an 'organization' value." Since appellant does not contend that it is not operating at a profit or that it has no reasonable expectation of earning a profit in the future, even it would be forced to admit, as must the majority of this Court, that a substantial element of property values is being immunized from the reach of Virginia's current taxes which are neither excessive nor unfair.

From 1942 until *Spector*, appellant had recognized the validity of the tax and paid it. As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the *Spector* doctrine. If the label makes the tax invalid, the label is accepted; if the label validates the tax, the Court will pierce the label. This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises.

In sum, Virginia's tax should not be held unconstitutional merely because of the name the state's legislature gave it. Since no one asserts that the amount of the tax is unfair or discriminatory, presumably the same tax assessed under a different name by the use of different words would be upheld. The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval.